80-1837

No. _____

Office-Supreme Court, U.S.
FILED
APR 29 1981
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1981

FAITH BAPTIST CHURCH OF LOUISVILLE, NEBRASKA, a Corporation; FAITH CHRISTIAN SCHOOL, LOUISVILLE, NEBRASKA; EVERETT SILEVEN; EDGAR GILBERT; TRESSIE SILEVEN; MARTHA GILBERT; HELEN ALDRICH; RALPH LILES; KENNETH HEARD; DAVE CARLSON; and WALTER PETERSON,

Appellants,

vs.

STATE OF NEBRASKA, EX REL. PAUL L. DOUGLAS, Nebraska Attorney General and RONALD D. MORAVEC, Cass County Attorney,

Appellees.

Appeal from the Supreme Court of Nebraska

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY THE APPEAL

1. Whether The Nebraska Educational Statutes And Rules Promulgated By The Nebraska State Department of Education Pertaining To State Approval Of Church-Schools And Teacher Certification, On Their Face And As Applied, Deprive Appellants Of The Free Exercise Of Their Religion In Violation Of The First Amendment Of The United States Constitution.
2. Whether The Nebraska Educational Statutes And Rules Promulgated By The Nebraska State Department Of Education Pertaining To State Approval Of Church-Schools And Teacher Certification, On Their Face And As Applied, Violate The Individual Appellants' Fundamental Rights To Bear, Raise And Educate Their Children As Provided For Under The Ninth And Fourteenth Amendments To The United States Constitution.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

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No. .....

In The

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October Term, 1981

FAITH BAPTIST CHURCH OF LOUISVILLE, NEBRASKA, a Corporation; FAITH CHRISTIAN SCHOOL, LOUISVILLE, NEBRASKA; EVERETT SILEVEN; EDGAR GILBERT; TRESSIE SILEVEN; MARTHA GILBERT; HELEN ALDRICH; RALPH LILES; KENNETH HEARD; DAVE CARLSON; and WALTER PETERSON,

Appellants,

vs.

STATE OF NEBRASKA, EX REL. PAUL L. DOUGLAS, Nebraska Attorney General and RONALD D. MORAVEC, Cass County Attorney,

Appellees.

Appeal from the Supreme Court of Nebraska

JURISDICTIONAL STATEMENT

Pursuant to Rule 12.3 of the Rules of the Supreme Court of the United States, appellants, Faith Baptist Church of Louisville, Nebraska et al., file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment entered by the Supreme Court of Nebraska in this case and should exercise such jurisdiction herein.

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska is reported at 207 Neb. 802 and is printed in Appendix A hereto, infra, page App. 31. The memorandum opinion and judgment of the District Court of Cass County, Nebraska is unreported and is printed in Appendix A, hereto, infra, page App. 1.

GROUNDS OF JURISDICTION

This appeal arises from an action to enjoin the operation of appellants' church-school for their failure to comply with those provisions of the Nebraska educational laws pertaining to state approval and teacher certification. The judgment of the Supreme Court of Nebraska was entered on January 30, 1981. A timely notice of appeal was filed on April 16th, 1981, in the Supreme Court of Nebraska. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257 (2).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves the following provisions of the First, Ninth and Fourteenth Amendments to the Constitution of the United States:

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case involves the following educational statutes and regulations of the State of Nebraska:

Neb. Rev. Stat. §§ 79-201, 79-207, 79-312, 79-1229, 79-1233, 79-1239, 79-1247.05, 79-1247.06, 79-1701 and 79-1707.

Rule 14, Department of Education, State of Nebraska.

The pertinent text of the above-cited statutes and regulations are set forth verbatim in Appendix D hereto, infra, pages App. 44-92.

———o———

STATEMENT OF THE CASE AND FACTS

This is an action by the State of Nebraska for injunctive relief brought against Faith Baptist Church, its related ministry Faith Christian School, and individual parties who are: a minister of the church, parents of students, teachers at the church-school, and/or administrators of the church-school. The petition filed by the state alleged that Faith Christian School is operating in violation of the following statutes and regulations: Neb. Rev. Stat. §§ 79-201, 79-207, 79-312, 79-1229, 79-1233, 79-1239, 79-1247.05, 79-1247.06, 79-1701, and Rule 14.

The appellants established as a fact at all levels below that Faith Christian School is an inseparable ministry of Faith Baptist Church and is therefore exempt from complying with the statutes and regulations cited by the plaintiff under the First, Ninth and Fourteenth amendments of the United States Constitution.

The appellant, Faith Baptist Church, is a Nebraska non-profit corporation located in Louisville, Nebraska. Faith Baptist Church is an independent, fundamental, Bible-believing teaching church whose members hold a firm conviction that the Bible is the inspired Word of God and that it must serve as the source of guidance for all aspects of life. Among the Biblical mandates adhered to by the members of Faith Baptist Church is the command to give one's children a Christian education. *Proverbs 22:6* states: "Train up a child in the way he should go . . ." This verse requires that Christian parents educate their children according to God's Word in a manner consistent with the teaching of the Bible (207 Neb. 802, 806). The members of Faith Baptist

Church believe the only way to fulfill this command would be to establish their own school where their children could learn in a Christian environment (207 Neb. 802, 806). As a result of this religious conviction, Faith Christian School began operating in the fall of 1977 as an inseparable part of the ministry of Faith Baptist Church (207 Neb. 802, 804).

The Reverend Everett Sileven has been the pastor of Faith Baptist Church since January, 1976 and is the superintendent of Faith Christian School. Tressie Sileven, Martha Gilbert and Helen Aldrich are monitors at Faith Christian School. Appellants Kenneth Heard and David Carlson are members of the Board of Directors of Faith Baptist Church. With the guidance of the Bible and of the church members they establish policy for Faith Baptist Church and Faith Christian School. No application has ever been made by or on the behalf of Faith Baptist Church or Faith Christian School to the Nebraska Department of Education for approval of Faith Christian School to operate as an approved school system (207 Neb. 802, 805). None of the supervisors or monitors in Faith Christian School hold a teaching certificate or a permit issued by the State Department of Education of the State of Nebraska.

Faith Christian School was in operation for 180 days during both 1977-78 and 1978-79. The school utilizes a curriculum developed by Accelerated Christian Education, Inc. (207 Neb. 802, 805) (hereinafter referred to as ACE). ACE was used in approximately 2500 schools during 1978-79 and it was estimated it was used in over 3000 schools in 1979-80. The curriculum used at Faith Christian School has been approved for use in other schools

by the Nebraska Department of Education (207 Neb. 802, 805).

The ACE curriculum is unique in that each student works at his own rate of speed in each of the various subject areas (207 Neb. 802, 805). If a student has difficulty with a particular subject, he can receive help from a monitor. The courses are, however, essentially self taught. Consequently, the ACE program does not employ teachers *per se* in the traditional sense of one who is responsible for imparting knowledge to the child. In the elementary grades, English, mathematics, science, social studies, spelling, reading, art, health, music and Christian womanhood are taught. The high school curriculum is the same with the addition of home economics and typing. Each subject is organized into numerous packets of material which increase in difficulty as the child progresses. The packets are formally called *"PACES,"* there being 12 *PACES* per subject per grade. Thus, a child who graduates from grade twelve in a school utilizing the ACE system will have completed approximately 144 *PACES* in each subject taken.

The ACE method differs from other educational methods in that all subjects are presented to the students from a Biblical viewpoint (207 Neb. 802, 805). Thus, the *PACES* used in the ACE schools are replete with verses taken directly from the Bible (207 Neb. 802, 805). A child learning via the ACE system, therefore, is continuously being exposed to the Word of God, no matter what subject he is studying. Therefore, all subjects taught as part of the ACE curriculum are religious in nature, not secular. There is no tuition charged.

On May 11, 1979 a hearing was held on respondents' motion for a temporary injunction. That motion was denied by the District Court. Further hearings were held on July 16, 17, 18, 1979 upon respondents' request for a permanent injunction.

A. Proceedings In The District Court.

On July 16, 17, and 18, 1979 a hearing was held in the District Court of Cass County, Nebraska on appellees' request that appellant be permanently enjoined from the operation of its school, Faith Christian School, until such time as the appellant had complied with the Nebraska statutes and the rules and regulations of the Department of Education governing schools. Regarding their noncompliance with the Nebraska educational laws appellants: (1) refused to request state approval of Faith Christian School and its ACE program as required by Rule 14 as promulgated and published by the State Board of Education; (2) neglected and refused to employ state-accredited teachers in Faith Christian School as required by Rule 14; and (3) refused to furnish "third-day reports" containing the names and addresses of all students enrolled in Faith Christian School as required by Neb. Rev. Stat. § 79-207.

It was established and uncontroverted at trial as a matter of fact that appellants are fundamental Bible-believing Christians. The members of Faith Baptist Church follow essentially the teachings of the Bible as a matter of firm convictional belief and incorporate the Bible and its principles into every aspect of their lives. In testimony before the court, appellant Reverend Sileven stated that he and the people of Faith Baptist Church

sincerely believe that they must raise and educate their children only in the Christian way of life as prescribed in the Bible. It is their belief that such education must be divorced from any and all influences or philosophies which are not totally Bible-centered. Since the philosophy of the public schools and the State Department of Education obviously is not, and cannot, by law be Biblically-centered, Reverend Sileven testified that any action by the State Department of Education in approving or regulating Faith Christian School, pursuant to the statutes and rules cited herein would be equivalent to accepting the principles and philosophies of the public educational system, which would violate their own sincerely held religious beliefs (District Court Opinion, Appendix A, p. App. 33). Such a violation infringes upon appellants' right to the free exercise of religion guaranteed by the First Amendment to the United States Constitution.

At no time during the course of trial did the state make any attempt to dispute the fact that the appellants' religious beliefs are truly held. The District Court did recognize the sincerity of the appellants' religious convictions, and that interference by the Nebraska Department of Education in the form of the contested statutes and regulations would infringe upon those convictions (District Court Opinion, Appendix A, p. App. 38).

The District Court, declining to apply the test of compelling state interest recognized by this Court in *Wisconsin v. Yoder,* 406 U.S. 205 (1972), held that the Nebraska educational statutes and regulations were reasonable legislative enactments and that the religious beliefs of the appellants would not exempt them from the reasonable requirements of the state educational laws. In

this regard the District Court stated that "[t]he constitutional protection of religious freedom, while it ensures religious equality on one hand, does not provide for immunity from compliance with reasonable civil requirements imposed by the state." (District Court Opinion, Appendix A, p. App. 38.)

B. Proceedings In The Supreme Court of Nebraska.

Appellants appealed the lower court's decision to the Supreme Court of Nebraska. Besides arguing the fundamental unfairness resulting from inherent inconsistencies throughout the entire Nebraska educational statutory scheme, appellants renewed their arguments that the educational statutes and regulations seriously infringed upon their free exercise rights, and their rights to direct the education and upbringing of their children. Appellants especially noted that the District Court had based its decision on Nebraska precedent, *Meyerkorth v. State,* 173 Neb. 889, 115 N. W. 2d 585 (1962),which could no longer be considered controlling in light of this Court's decision in *Wisconsin v. Yoder,* 406 U. S. 205 (1972). Appellants argued that the District Court erred in not applying the tests of "compelling state interest" and "less drastic means" as outlined in *Yoder* and *Sherbert v. Verner,* 374 U. S. 398 (1963). Had the court properly applied those tests, it would have found that the state failed to articulate a compelling state interest that justified the demonstrated infringement of appellants' free exercise rights.

The Supreme Court of Nebraska affirmed the decision of the lower court holding that the Nebraska educational laws as applied to appellants did satisfy a compelling state interest, and that the appellants' refusal to comply with those laws is "an arbitrary and unreasonable

attempt to thwart the legitimate, reasonable and compelling interests of the State in carrying out its educational obligations, under a claim of religious freedom." (207 Neb. 802 at 817).

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial federal questions in that the decision of the Supreme Court of Nebraska upholding the validity of the Nebraska educational statutes and rules cited herein violates the appellants' rights under the First, Ninth and Fourteenth Amendments to the United States Constitution.

I.

The Nebraska educational statutes pertaining to state approval of Christian church-schools and teacher certification deprive appellants of the free exercise of their religion in violation of the First Amendment to the United States Constitution. The protections afforded appellants under the free exercise clause of the First Amendment have been made applicable to the states through the Fourteenth Amendment. *Cantwell v. Connecticut,* 310 U. S. 296, 303 (1940). Under *Wisconsin v. Yoder,* the appellants are required to demonstrate that their religious convictions are truly held, and that their religious faith and their mode of life are inseparable and interdependent. 406 U. S. at 215, 235. Appellants must demonstrate that the state program of regulating their Christian schools has a detrimental impact on the free exercise of their religious convictions. *Id.* at 217-218, 235.

It was established and uncontroverted at trial that appellants' religious convictions are sincerely held and that any action by the State Department of Education in ap-

proving Faith Christian School or requiring Faith Christian School to employ state-certified teachers would violate those religious convictions. Both the District Court and the Supreme Court of Nebraska assumed the sincerity of the appellants' religious convictions in this regard and that the requirements of state approval and state certification of teachers would infringe upon those convictions (207 Neb. 802, 812).

It is incumbent on the state, therefore, to show that its regulatory plan serves a compelling state interest, and that this interest could not be served by an alternative means having a less drastic impact on appellants' free exercise rights. In *Yoder*, this Court stated:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.

406 U. S. at 215.

In *Sherbert v. Verner*, this Court held that once the appellant demonstrated that the state law interfered with the free exercise of her truly-held religious convictions, the burden of proof shifted to the state *"to demonstrate that no alternative forms of regulation would* [further the state interest] *without infringing First Amendment rights."* 374 U. S. at 407.

The state interest in education is rather narrow. *Yoder* held that *"some degree of education is necessary to prepare citizens to participate effectively and intelligently in our political system . . ."* and that *"education prepares in-*

dividuals to be self-reliant and self-sufficient participants in our society." 406 U. S. at 221. In 1919, the Nebraska Supreme Court was more explicit, when it held:

> The state should control the education of its citizens far enough to see that it is given in the language of their country and to insure that they understand the nature of the government under which they live, and are competent to take part in it. Further than this, education should be left to the fullest freedom of the individual.

Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and Other States v. McKelvie, 104 Neb. 93, 175 N. W. 531 (1919).

The state interest in education is fully satisfied, if students attending Christian schools learn to read, write, work with numbers, and understand the American form of government. It was proven that students attending Faith Christian School are actually more proficient in these skills than are children attending public schools. The results of standardized testing show that the students at Faith Christian School are actually learning the skills necessary for self-reliance and good citizenship (207 Neb. 802, 807). This fact standing alone, fully satisfies the state interest in compulsory education. The *means* by which these results are obtained—whether *"approved"* by the state or not—are irrelevant to the state interest.

In its decision, however, the Supreme Court of Nebraska paid little heed to the fact that the students at Faith Christian School are receiving a quality education. It held, instead, that the challenged statutes and regulations were necessary to further the compelling interests of the state in carrying out its educational obligations and

that the infringement upon religious convictions was therefore justified (207 Neb. 802, 917). Yet the Supreme Court of Nebraska arrived at this holding without any clear demonstration by the state what its educational obligations are and what compelling state interest is advanced by the satisfaction of those obligations. The record itself is devoid of even an *attempt* by the state to articulate precisely what those educational obligations are and how they are necessary to the advancement of a compelling state interest, let alone a definitive showing that state approval of private Christian schools and state certification of those schools' teachers do in fact satisfy those obligations and/or a compelling state interest. Since the Supreme Court of Nebraska accepted the sincerity of appellants' religious convictions and recognized the actual infringement upon those convictions resulting from state approval and state certification, (207 Neb. 802, 812), it could have upheld the constitutional validity of those requirements only upon a clear showing by the state that a compelling state interest did in fact exist and that those requirements were necessary for the advancement of that interest. The state, however, failed to make that showing and thus it is submitted that in this regard the Supreme Court of Nebraska failed to apply properly the test established by this Court in *Wisconsin v. Yoder*. It is further submitted that the Supreme Court of Nebraska failed to hold the state to its burden of proving the absence of less restrictive alternative means so as to justify the actual infringement upon the appellants' religious convictions.

The holding of the Supreme Court of Nebraska in sustaining the validity of the state approval and state certification requirements is also based largely upon its

findings that other Christian schools throughout Nebraska have sought state approval and have complied with the requirement that they employ state-certified teachers (207 Neb. 802, 817; District Court Opinion, Appendix A, p. App. 35). Implicit in this finding is the claim that appellants cannot object to laws that infringe upon their religious convictions if such an objection is not universally voiced by all those who adhere to the same religious beliefs and tenets. This Court expressly rejected such a claim, however, in *Wisconsin v. Yoder,* and has again rejected such a claim in the recent decision of *Thomas v. Review Board of the Indiana Employment Security Division,* 49 U. S. L. W. 4341 (1981) where this Court stated:

> The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judical competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

41 U. S. L. W. at 4343-4344.

By relying on the claim that other Christian schools in Nebraska accept state approval and state certification,

the Supreme Court of Nebraska improperly upheld the constitutionality of those statutory requirements in derogation of the appellants' own truly held religious beliefs. It is thus submitted that in this regard the Supreme Court of Nebraska failed to abide by the rule of law recognized by this Court in *Sherbert v. Verner, Wisconsin v. Yoder* and most recently in *Thomas v. Review Board of the Indiana Employment Security Division.*

II.

The Nebraska educational statutes, insofar as the appellants are not in compliance with them, are unconstitutional in that they violate the appellants' fundamental rights to bear, raise and educate their children as they see fit. These rights have been long recognized by legal scholars and by the courts as not only existing but as being fundamental. Many have found them in the phrase "liberty" of the Fourteenth Amendment which reads in part that no one "shall be deprived of life, liberty or property without due process of law." Others have pointed to the Ninth Amendment to the U. S. Constitution as the source of these fundamental rights:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

These rights have long been recognized by the American Courts and by freedom-loving people everywhere as a cornerstone of American liberty. The United Nations Declaration of Human Rights recognizes that the fundamental unit of society is the family, and that parents have a right to control the education of their children.

These fundamental rights were clearly recognized by the Supreme Court of Minnesota in *Thiede v. Town of Scandia Valley,* 14 N. W. 2d 400 (1944):

> The entire social and political structure of America rests upon the cornerstone that all men have certain rights which are inherent and inalienable. Among these are the right to be protected in life, liberty, and the pursuit of happiness; the right to acquire, possess, and enjoy property; and the right to establish a home and family relations . . . , at 405.

Similarly, in cases before this Court, the right of privacy within marriage or family, including the right to rear children has long been recognized, but increasingly so in recent years, as evidenced by *Carey v. Population Services Intern.,* 431 U. S. 816, 97 S. Ct. 2010 (1977); *Roe v. Wade,* 410 U. S. 113, 93 S. Ct. 705 (1973); *Griswold v. State of Connecticut,* 381 U. S. 479, 85 S. Ct. 1678 (1965).

These principles have long been recognized by this Court specifically as applied to education. *Meyer v. State of Nebraska,* 262 U. S. 390, 43 S. Ct. 625 (1923). *Meyer v. State of Nebraska* involved a Nebraska law which prohibited the teaching of foreign languages before a certain age level. This Court quoted the Fourteenth Amendment provisions concerning "life, liberty or property" and went on to state:

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not only freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home

> and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

262 U. S. at 399.

The Court continued by pointing out the right of the teacher to teach and the right of a parent to engage a person to teach, thus indicating the right of parents to choose the type of education their children should receive:

> Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment.

262 U. S. at 400.

See also *Bartels v. State of Iowa,* and *Bohning v. State of Ohio,* both cited at 262 U. S. 404, 43 S. Ct. 628 (1923), two cases decided at the same time as *Meyer v. Nebraska, supra,* involving the teaching of German, and decided in accordance with the principles stated in *Meyer v. Nebraska.*

The right of parents to control and decide their children's education is a clearly recognized fundamental constitutional right. As such, it may not be unduly interfered with by the state. Recent decisions by this Court, such as *Griswold, supra,* indicate that such a fundamental right can be infringed upon only if necessary to advance a "compelling state interest." The state may not simply employ a "balancing act," that is, balancing the state interest against the degree of interference with the parental right. Rather, the state interest must be "com-

pelling" or the parental right to educate the child must be held inviolate.

It is also incumbent upon the state to show that its statutes and regulations are the only available means of furthering its compelling interest, thus justifying an infringement upon appellants' fundamental rights. The decisions of this Court have recognized this rule of law on numerous occasions. *Aptheker v. Secretary of State,* 378 U.S. 500 (1964); *Sherbert v. Verner,* 374 U.S. 398 (1963); *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963); *Shelton v. Tucker,* 364 U.S. 479 (1960).

In the instant case the District Court enjoined the operation of Faith Christian School until such time as the individual appellants have complied with those provisions of the Nebraska educational statutes and regulations governing approved schools (District Court Judgment, Appendix B, p. App. 41).

The Supreme Court of Nebraska affirmed the holding of the District Court and held that the educational statutes and regulations challenged by the appellants were necessary to further the "compelling state interests of the State in carrying out its educational obligations . . . ." 207 Neb. 802 at 817. The court stated that the requirement that Christian schools employ state-certified teachers and be state approved was a reasonable regulation that could not be invalidated simply because of a claim that it interfered with the rights of appellants to direct the education and upbringing of their children (207 Neb. 802 at 817).

The decision of the Supreme Court of Nebraska has now prohibited the operation of Faith Christian School

unless and until it obtains state approval and employs state certified teachers; until that time the school must cease to function as a ministry of the Faith Baptist Church. This case presents a substantial federal question, therefore, in that the court's decision in sustaining the validity of the challenged laws deprives the individual appellants (and many other parents who were not made parties to the suit and yet who have been sending their children to Faith Christian School) of their constitutional rights to raise and educate their children as they see fit and in conformance with their own religious beliefs. These parents have now been told that they may not send their children to a Christian school which is not state approved and which does not employ state-certified teachers, even though that school provides their children with a quality education that is Biblically-based and is precisely the type of education that these parents desire for their children. This Court has heretofore not ruled on the question of whether state regulation of Christian church-schools in the form of state approval and state certification of their teachers is constitutionally permissible and necessary to further any compelling state interests; the Supreme Court of Nebraska has answered this question in the affirmative. Appellants submit that there exists a substantial federal question and that the time has come for this Court to resolve that question.

CONCLUSION

For the reasons stated above, appellants submit that this appeal brings before the Court substantial and important federal questions which require plenary consider-

ation, with briefs on the merits and oral argument, for their resolution, and that this appeal involves a substantial federal question not heretofore decided by this Court, and that now is the proper time for this Court to resolve this issue.

Respectfully submitted,

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APPENDIX A

OPINIONS BELOW

Advance Sheets
802 NEBRASKA REPORTS VOL. 207

State ex rel. Douglas v. Faith Baptist Church

STATE OF NEBRASKA ex rel.,
PAUL L. DOUGLAS et al.,

Appellees,

vs.

FAITH BAPTIST CHURCH OF LOUISVILLE,
NEBRASKA, a Corporation, et al.,

Appellants.

— N. W. 2d —

Filed January 30, 1981. No. 43029.

1. Equity: Injunctive Relief. A court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the law, even though these acts may be subject to criminal sanctions.

2. Schools and School Districts. The mandate provided for in Neb. Rev. Stat. § 79-312 (Reissue 1976) that the State Department of Education prescribe a course of study for public schools is met when such department furnishes a list of subjects required to be taught, together with an explanation of the aims sought to be accomplished by the individual program.

3. —— There is no absolute duty on the part of county superintendents to furnish written or printed questions to school districts to be used for review of the various courses of study. Neb. Rev. Stat. § 79-312 (Reissue 1976) leaves this decision up to the county superintendent as in his judgment may be necessary or expedient.

4. —— A state agency which requires as a minimum for certification of an individual, the maximum requirement permitted by statute does not violate the limiting terms of such statute.

5. —— The State, having a high responsibility for the education of its citizens, has the power to impose reasonable regulations for the control and duration of basic education.

6. —— A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations.

7. —— A state always has a legitimate concern for maintaining minimum standards in all schools it allows to operate.

8. —— The State has a compelling interest in the quality and ability of those who are employed to teach its young people, and a requirement that such teacher possess an appropriate baccalaureate degree is neither arbitrary nor unreasonable and is a reliable indicator of the probability of success as a teacher.

9. —— Although parents have a right to send their children to schools other than public institutions, they do not have the right to be completely unfettered by reasonable government regulations as to the quality of the education furnished.

Appeal from the District Court for Cass County: Raymond J. Case, Judge. Affirmed.

(803) David C. Gibbs, Jr. and Charles E. Craze of Gibbs & Craze and Meyer Coren of Viren, Epstein, Leahy & Coren for appellants.

Paul L. Douglas, Attorney General, and Harold Mosher for appellees.

Heard before Krivosha, C. J., Boslaugh, McCown, Brodkey, White, and Hastings, JJ., and Colwell, District Judge.

Hastings, J.

This was an action brought by the State of Nebraska on the relation of the Attorney General against Faith Baptist Church of Louisville, Nebraska, and certain individuals being officers and employees of the principal defendant. It sought to enjoin the operation of an elementary and secondary school by the defendants because there had been no compliance with the school laws of the State of Nebraska. From a judgment granting such relief, the defendants have appealed to this court. Upon consideration de novo on the record, we affirm.

The defendants claim that the trial court erred in granting the injunction because: (1) Criminal sanctions are the remedy prescribed by the applicable statutes rather than equitable relief; (2) The State of Nebraska through the State Department of Education has failed to abide by the same statutes and rules that it asks to be enforced against the defendants; (3) Enforcement of the school laws violates the defendants' ninth amendment rights to bear, raise, and educate their children as they see fit; and (4) Enforcement of the school laws violates the defendants' first amendment rights as to freedom of religion.

As a part of the factual background, it should be helpful to set out certain basic statutory provisions. Neb. Rev. Stat. § 79-201 (Reissue 1976) requires that every person having charge or control of any child between the

ages of 7 and 16 "shall cause such child (804) to attend regularly the public, private, denominational, or parochial day schools each day that such schools are open and in session . . . ." Among other things, Neb. Rev. Stat. § 79-328 (Reissue 1976) requires that the State Board of Education shall have the power and duty to provide "supervision of the state school system"; to "establish . . . procedures for classifying, approving, and accrediting schools . . . for the continued legal operation of all schools"; and to "cause to be published laws and regulations governing the schools." In addition, the State Board of Education has caused to be promulgated and published Rule 14, which contains regulations and procedures for approving the continued legal operation of all schools. That rule provides: "Only school systems approved for continued legal operation by the State Board of Education are considered to be providing a program of instruction which is in compliance with the compulsory attendance laws." It goes on to set forth what the curriculum shall consist of, and prescribes for the use of necessary materials and equipment, the length of the school day and year, and requirements relating to health and safety. Additionally, it requires the filing of a "Fall Approval Report" and an "Annual Term Summary Report," and, in order for a school to become approved and remain so, it mandates that each professional staff member employed by the school must "hold a valid Nebraska certificate or permit issued by the State Board of Education legalizing him or her to teach the grades or subjects to which elected." Rule 21, also adopted by the State Board of Education, provides rules for the issuance of certificates and permits to teach in Nebraska schools. Generally speaking, in order to qualify for a regular cer-

tificate, it is necessary that the applicant have obtained a baccalaureate degree.

On August 29, 1977, the defendants began operating the Faith Christian School in Louisville, Nebraska. The curriculum employed by this school is that sup (805) plied by Accelerated Christian Education (A.C.E.), and consists of a series of booklets called Packet of Accelerated Christian Education (PACE), which contain instructional information and self-test questions in various subjects and at different instructional levels. Each student works at his or her own speed, and, after completing each PACE and attaining a grade of at least 80 percent on the self test and the PACE test given under the supervision of the supervisor, moves on to the nevt sequentially numbered PACE. The teachers as such are supervisors who administer the tests and are available for helping a particular student who may be having difficulty. Their function is not to teach, but to monitor or supervise. The instruction is Bible-oriented. For example, PACE 25 in social studies is devoted to the first chapter of *Genesis*, and its outline topics include The Creation of the Heavens and the Earth. The Seven Days of Creation, and the Garden of Eden. PACE 7 in mathematics consists of problems in simple addition and subtraction, interspersed with biblical sayings and citations. One gets the impression that the method of instruction is not unlike a correspondence course, with the addition of helping supervisors.

In spite of requests from the various local and state school officials, the defendants have refused to furnish "third-day reports" containing the names and addresses of all students enrolled in their school, as required by

Neb. Rev. Stat. § 79-207 (Reissue 1976). This is necessary so as to check parents' compliance with compulsory attendance laws. They have stated that they have not and will not request approval of their A.C.E. program, even though they have been told that it would be approved, and they have neglected and refused to employ accredited teachers and to seek approval from the State of Nebraska to operate their school. It is their position that the operation of the school is simply an extension of the ministry of the church, over which the State of Nebraska has no authority to approve or accredit.

(806) According to the defendants, as expressed by defendant Everett Sileven, pastor of the defendant church, a Christian education is mandated by the Bible. He cites *Deuteronomy* 6:6, 7, which, according to Today's English Version, states: "Never forget these commands that I am giving you today. Teach them to your children. Repeat them when you are at home and when you are away, when you are resting and when you are working." *Proverbs* 22:6 says: "Teach a child how he should live, and he will remember it all his life." And, although the record indicates a citation to *Ephesians* 5:4, undoubtedly the reference is to Chapter 6: "Parents, do not treat your children in such a way as to make them angry. Instead, raise them with Christian discipline and instruction." Their belief is that teaching is a way of life and not simply a 5-hours-a-day, 5-days-a-week proposition. It is the defendants' belief that the public schools of today are overrun with an increase in crime, drug and alcohol addiction, teacher assaults, vandalism, and disrespect for authority and property. Additionally, and basically, according to Mr. Sileven, secular humanism is the basic

philosophy of the public educational system, which is in direct opposition to the defendants' belief in biblical Christianity. It is because of these beliefs that the Faith Christian School was organized. Defendants further maintain that, because their philosophy is Christian and that of the State Department of Education is not, the latter is not capable of judging the philosophy of the defendants' school. Finally, because the state school laws require inspection of the schools by the county superintendent, the defendants cannot submit to such control because the State has no right to inspect God's property.

According to the testimony of Stephen W. Sturtevant, a certified teacher currently employed by the Fletcher Christian Academy at Axtell, and a teacher for a total of 8½ years, he had examined the achievement tests administered to the Faith Christian School students. (807) Although there is no underlying basis in the record for any such conclusion, he stated as his opinion that the students at the defendant school were accomplishing the average amount of progress that most students probably were in Nebraska schools. Other witnesses, who qualified as experts in the field of education, ventured the opinion that the mere fact that a person held a baccalaureat degree did not mean that he or she would be a good teacher. Additional facts will be set forth throughout this opinion as may be required in discussing the various assignments of error.

Defendants' first assignment of error requires little comment. It is true that Neb. Rev. Stat. §§ 79-216 and 79-1707 (Reissue 1976) provide for penal sanctions in the event of violations of the various statutory provisions

relating to compulsory education and operation of private, denominational, and parochial schools. However, that does not foreclose the possibility of injunctive relief. "[A] court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the . . . law even though these acts may be subject to criminal prosecution." *State ex rel. Meyer v. Weiner,* 190 Neb. 30, 34, 205 N. W. 2d 649, 651 (1973).

Defendants complain that the State of Nebraska has failed to abide by the same statutes and rules that it asks to be enforced against these defendants. Specifically, it alleges that the State Department of Education has neglected to supply county superintendents with a course of study as prescribed by Neb. Rev. Stat. § 79-312(6) (Reissue 1976), and has continued to increase the standards for teacher certification, contrary to Neb. Rev. Stat. § 79-1247.03 (Reissue 1976). Section 79-312 does provide, in part, that "The county superintendent shall: . . . (6) furnish to each district in the county a copy of the course of study for public schools, as prescribed by the State Department of Education . . . ." By Rule 14, the State Department of Education has set forth in detail the subjects re (808) quired to be taught in both elementary and secondary schools, together with an explanation of the aims sought to be accomplished by each individual program. Implementation of the instructional program is left to the local school authorities to develop in order to meet the unique goals of the particular school community. The action of the state department seems to comply with the statutory mandate.

The standardized tests which the defendants complain have not been made available to all Nebraska stu-

dents are actually the responsibility of the county superintendent to furnish, but are not mandatory. "The county superintendent shall: . . . furnish to each district . . . such written or printed questions for reviews based upon such course of study *as in his judgment are necessary or expedient.*" § 79-312(6) (emphasis supplied). The tests which the defendants complain have not been made available, contrary to law, are the responsibility of the county superintendent, to be guided by "as in his judgment are necessary or expedient."

As to teacher certification, the defendants point to § 79-1247.03, which states that the purpose of the so-called teacher certification law is "to provide more flexibility in the certification of qualified teachers . . . and not to increase any requirements for certificates to teach." Neb. Rev. Stat. § 1247.05 (Reissue 1976) then grants broad powers to the State Board of Education to adopt rules and regulations governing the issuance of teaching certificates to be based upon "earned college credit" as well as other factors deemed to be important to a determination of fitness to teach. Neb. Rev. Stat. § 79-1247.06 (Reissue 1976) mandates that the maximum educational requirement which the board may require for the first issuance of a teaching certificate shall be a baccalaureate degree. Interestingly enough, that section as originally enacted in 1963, along with the other sections pertaining to teacher certification, allowed as a maximum to teach (809) elementary grades in Class I and Class II schools the completion of 2 years of a 4-year program of college preparation. The section as it presently exists was enacted in 1976, which eliminated the reference to the 2-year requirement. To read the teacher certification law,

as the defendants would have us do, would mean that the State Board of Education could never increase requirements for certification beyond that which it imposed in 1963. We reject that argument as wholly without foundation. The language in § 79-1247.03 was merely declarative of the Legislature's purpose in enacting the series of statutes. It has been modified by deletion of a portion of § 79-1247.06 as set out above. The state board, by enacting minimum requirements equal to, but not in excess of, the maximum provided by law has not violated that particular statute.

Defendants' contention as to violation of their first and ninth amendment rights will be considered together, because the question involved in both is the extent to which the State can, if at all, restrict these rights in the interest of assuring all children a quality basic education.

At first blush, it would appear that the case of *Meyerkorth v. State,* 173 Neb. 889, 115 N.W. 2d 585 (1962), is squarely in point and dispositive of the case, to the prejudice of the defendants. There the issue involved was the constitutionality of various statutes of the State of Nebraska concerning compulsory school attendance, certification of teachers, and supervision of nonpublic schools, the forerunners of the statutes involved here. The plaintiffs there, seeking a declaration that those laws were unconstitutional as a violation of their first amendment rights, raised arguments similar to those with which we are here faced: "The plaintiffs argue that the certification of teachers . . . and the minimal school standards provided for . . . above set forth, and the regulations promulgated by the Nebraska Department of Education, have no relevance to the interests of the state

in children not edu (810) cated in public, tax-supported schools; that none of these . . . have any materiality to testing children educated in parochial schools to ascertain if they know the language of their country, understand its government, and are able to participate in the democratic process; and that the above-mentioned sections and regulations infringe upon the rights of the parent and the constitutional right guaranteed to the citizens of the State of Nebraska." *Meyerkorth* at 898, 115 N.W. 2d at 590.

This court reviewed the holding of the U.S. Supreme Court in *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and cited the following language: "'The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned.'" *Meyerkorth* at 900, 115 N.W. 2d at 591. What the court, in *Meyer,* did hold was that the State of Nebraska could not prevent the teaching of the German language as an additional elective subject.

In *Meyerkorth,* we also cited *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), which struck down an Oregon law requiring all children to attend a public school. We referred generally to certain language from that case which we now set forth verbatim directly from *Pierce:* "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be

taught, and that nothing be taught which is manifestly inimical to the public welfare." 268 U. S. at 534.

This court concluded by saying: "As we view the statutes here involved, there is nothing arbitrary, unreasonable, or unconstitutional relating to the (811) qualifications of teachers to teach in the parochial, denominational, private, or public schools of this state or with the requirements of compulsory education and attendance at such schools." *Meyerkorth* at 904, 115 N. W. 2d at 593.

However, it is the defendants' position that the test of reasonableness as declared in *Meyerkorth* must give way to one of compelling state interest, which, they allege, is the rule announced in *Wisconsin v. Yoder,* 406 U. S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). In that case, the defendants were members of the Old Order Amish religion, and, as such, did not believe in conventional education for their children beyond the eighth grade. It was their contention that because the children would return to the isolated agrarian community of their families, additional formal education was to be supplanted by vocational instruction received "on the job." As a result, they were prosecuted for failure to comply with Wisconsin's compulsory school-attendance law, which required attendance by children until they reached the age of 16. The trial court, although finding that the law "'does interfere with the freedom of the Defendants to act in accordance with their sincere religious belief' it also concluded that the requirements of high school attendance until age 16 was a 'reasonable and constitutional' exercise of government power . . . ." 406 U. S. at 213. However, the convictions were reversed by the Wisconsin Supreme Court,

which latter judgment was affirmed by the U. S. Supreme Court.

Nevertheless, the *Yoder* court did recognize the principle upon which our decision in *Meyerkorth* was based. "There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." 406 U. S. at 213. However, it went on to say: "It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance (812) interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." 406 U. S. at 214.

In dealing with the question of the sincerity of the religious beliefs of the Amish, the *Yoder* court pointed out that "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations . . . ." 406 U. S. at 215. Although it is always difficult and perhaps inappropriate to challenge what others say their religious beliefs may be (in the case under consideration the defendants simply state that they believe they are biblically mandated to teach their children themselves), the *Yoder* court then encountered no such problem. "In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost *300* years of consistent practice, and strong evidence of a sustained faith pervading and regu-

lating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs." 406 U. S. at 219 (emphasis supplied). Although the record in the case before us demonstrates an educational practice of less than 2 years' duration, for the sake of this decision we assume the sincerity of their religious beliefs.

The *Yoder* court then introduced the "compelling interest" standard. "We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way . . . .

"The State advances two primary arguments in support of its system of compulsory education. It (813) notes . . . that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions." 406 U. S. at 221. But then the court reached the heart of the basis for its decision: "However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests . . . . It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority

live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith." 406 U. S. at 222.

The majority opinion in *Yoder,* then, although employing a "compelling interest" rule, nevertheless was greatly, if not completely, influenced by the process of balancing the specific interest of the state in 1 or 2 years of education beyond the eighth grade for students not expected to enter the mainstream of modern-day life against competing religious principles and practices nearly 3 centuries old. It is somewhat difficult to develop a generalized rule from the court's specific holding. The concurring opinion of Mr. Justice White, with whom, however, Mr. Justice Brennan and Mr. Justice Stewart joined, is more illuminating of the rule in its general application. "This would be a very different case for me is respondents' claim were that their religion forbade their children from attending any school at any time *and from complying in any way with the educational standards set by the State.*" 406 U. S. at 238 (emphasis sup (814) plied). And continuing: "As recently as last Term, the Court reemphasized the legitimacy of the State's concern for enforcing minimal educational standards, *Lemon v. Kurtzman,* 403 U. S. 602, 613 (1971)." (In *Lemon v. Kurtzman,* 403 U. S. 602, 613, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), the court said: "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate.") Mr. Justice White goes on to say in *Yoder: "Pierce v. Society of Sisters* [citations omitted] lends no support to the contention that parents may replace state educational requirements with their own idio-

syncratic views of what knowledge a child needs to be a productive and happy member of society; in *Pierce*, both the parochial and military schools were in compliance with all the educational standards that the State had set, and the Court held simply that while a State may posit such standards, it may not pre-empt the educational process by requiring children to attend public schools." 406 U. S. at 239.

Defendants cite *State v. Whisner*, 47 Ohio St. 2nd 181, 351 N. E. 2d 750 (1976), as supporting their position, an opinion by Celebrezze, J., who relies in no little measure upon the writings of Thoreau: "If a man does not keep pace with his companions, Perhaps it is because he hears a different drummer. Let him step to the music which he hears, However measured or far away.' " *Id.* at 216, 351 N. E. 2d at 771. Of course, it was just such philosophical prose which the *Yoder* court rejected as the basis for its judicial pronouncements: "Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religious Clauses." 406 U. S. at 216. Also, the Ohio court (815) set forth phrase after phrase wherein it pointed out that the Board of Education recited how the inspections shall be conducted; not only how long the instructional day should be but what percentage shall be devoted to each particularized course, leaving no time for biblical and spiritual training; required a minimum number of pupils; required that "all activities *shall conform*

to policies adopted by the board of education" (emphasis supplied); that there shall be cooperation and interaction between the school and the community; that each school shall give evidence of "cooperative assessment of community needs to determine the purposes . . . for future educational improvement"; that child study information shall not be released to the parents; and that organized group life shall act in accordance with established rules of social controls. We would be inclined to agree with the Ohio court's statement that "these standards are so pervasive and all-encompassing that total compliance with each and every standard by a non-public school would effectively eradicate the distinction between public and non-public education, and thereby deprive these appellants of their traditional interest as parents to direct the upbringing and education of their children." 47 Ohio St. 2d at 211-12, 351 N.E. 2d at 768. However, such requirements are not found among the statutory mandates of our laws.

Finally, defendants refer us to *Kentucky State Bd., Etc. v. Rudasill,* 589 S.W. 2d 877 (Ky. 1979), in which the author of that opinion, testing school certification statutes against a constitutional provision which provided that "nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed," wrote the following: "Certainly, the receipt of 'a bachelor's degree from a standard college or university' is an indicator of the level of achievement, but it is not a sine qua non the absence of which establishes that private and parochial school teachers are unable to teach their students to intelli (816) gently exercise the elective franchise." 589 S.W. 2d at 884. However, to the contrary is an opinion from the Supreme Court of Alaska which

held that a requirement that an applicant must have graduated from a law school accredited by the American Bar Association as a prerequisite for admission to the bar of Alaska did not deprive the applicant of his constitutional rights. "While there is some risk that a person could be deprived of the opportunity to practice law by reason of the bar rule, even though he is competent to practice law, we believe that such a risk is outweighed by the difficulty which would be presented by making a case-by-case determination of whether the education afforded by an unaccredited law school was comparable to that given by an accredited school. We have already noted the difficulty of employing such an alternative procedure.

"The ABA system of accreditation is sophisticated and time-consuming. We can think of no effective substitute which could be developed at the state level without diverting impractical amounts of manpower and money into such an inquiry. Given the strong state interest in assuring that those entering the practice of law have had suitable training in adequate institutions, and considering the precedent from other jurisdictions, we are of the opinion that the Alaska bar rule requirement is valid and does not violate the due process clause of either the Alaska Constitution or the United States Constitution." *Application of Urie*, 617 P. 2d 505, 508 (Alaska 1980).

We are not suggesting as an absolute that every person who has earned a baccalaureate degree in teaching is going to become a good teacher, any more than one who has obtained the appropriate training and education will become a good engineer, lawyer, beauty operator,

welder, or pipefitter. However, we think it cannot fairly be disputed that such a requirement is neither arbitrary nor unreasonable; additionally, we believe it is also a reliable indicator of the (817) probability of success in that particular field. We believe that it goes without saying that the State has a compelling interest in the quality and ability of those who are to teach its young people.

The cases we have cited from the Supreme Court of the United States should leave no doubt as to the critical interest which the State has in the quality of the education provided its youth. Although parents have a right to send their children to schools other than public institutions, they do not have the right to be completely unfettered by reasonable government regulations as to the quality of the education furnished. Defendants insist that this can be accomplished by annual comparative tests. The problem with testing is that it sometimes comes too late. If the deficiency of the education being afforded is not discovered until the end of the year, the child has wasted that year. The requirements as to curriculum as imposed by the state board appear to be very minimal in nature. All that is required is that certain subjects be taught. There is no effort to dictate in what manner that knowledge shall be imparted. As a matter of fact, the defendants have complained, in part, because no course of study has been prescribed by the State. This is not the type of regulation which the *Whisner* court found objectionable. The defendants concede, and the State confirms, that the curriculum utilized by the defendants, the A. C. E. program, is acceptable and approved and being used by other schools within the state. The refusal of the defendants to comply with the compulsory educa-

tion laws of the State of Nebraska as applied in this case is an arbitrary and unreasonable attempt to thwart the legitimate, reasonable, and compelling interests of the State in carrying out its educational obligations, under a claim of religious freedom.

The judgment of the District Court is affirmed.

AFFIRMED.

(818) Krivosha, C. J., concurring in part, and in part dissenting.

I find that I must in part concur with and in part dissent from the majority opinion in this case.

I concur in that portion of the majority opinion which holds that the State, having a high responsibility for the education of its citizens, has the power to impose *"reasonable regulations"* for the control and duration of basic education. I believe that principle applies even though the reasonable regulations may, in some manner, affect what an individual or group maintains is their religious belief. Neither the U. S. Const. art. I nor art. IX, nor the corresponding sections of our own state Constitution, grants individuals or groups carte blanche authority to reject all State control over their activity in the name of religion.

Early in our nation's history, we were called upon to make such decisions. In 1878 the U. S. Supreme Court, in the case of *Reynolds v. United States,* 98 U. S. 145, 25 L. Ed. 244 (1878), was called upon to determine the validity of Utah's prohibition against polygamy, a practice of the Mormon religion. In upholding the Utah law against a claim that the prohibition violated the Mormon's freedom

of religion, the U. S. Supreme Court reviewed the history of our Constitution, and in particular the first amendment. It concluded from that examination that while polygamy may have its basis in the Old Testament, it could, nevertheless, be outlawed in this country. In doing so, the U. S. Supreme Court held that a party's religious belief could not be accepted as a justification for his committing on overt act made criminal by the law of the land. That view has prevailed throughout the history of our country and was recently repeated in the case of *Wisconsin v. Yoder*, 406 U. S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15, 27-28 (1971), wherein Chief Justice Burger noted: "It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of (819) their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. See, *e. g., Gillette v. United States*, 401 U. S. 437 [91 S. Ct. 828, 28 L. Ed. 2d 168] (1971); *Braunfeld v. Brown*, 366 U. S. 599 [81 S. Ct. 1144, 6 L. Ed. 2d 563] (1961); *Prince v. Massachusetts*, 321 U. S. 158 [64 S. Ct. 438, 88 L. Ed. 645] (1944); *Reynolds v. United States*, 98 U. S. 145 [25 L. Ed. 244] (1879)." *Id.* at 220. It would seem clear, beyond debate, that if a group claimed a first amendment right to reestablish the ancient Temple requirements of twice-daily animal sacrifices, the State, under proper conditions, could prohibit such act. The right of one's religious freedom does not totally eliminate the State's right to regulate the health, safety, and welfare of its citizens in an appropriate case.

Appellants' claim that the Bible prohibits them from permitting the State any supervisory right over the education of their children fails by reason of the very argument

itself. Appellants contend their right to be exempt from all governmental supervision in regard to the education of their children stems from the biblical requirements concerning the education of children and, therefore, clearly falls within the protection granted by the first amendment. Appellants' biblical argument, however, fails to consider all of the requirements relating to their position. In particular, their position fails to recognize the ancient Rabbinic principle first laid down by the Babylonian Jewish Scholar Samuel, and known as *dina de-malkhuta dina,* a halakhic rule that the law of the country is binding and in certain cases is to be preferred. Under this doctrine, one may not ignore the secular law of the country in which one lives.

As noted by a host of decisions from various jurisdictions, a State, having a high responsibility for the education of its citizens, may impose reasonable regulations for the control and duration of basic education. See *Pierce v. Society of Sisters,* 268 U. S. 510, (820) 534, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). For that reason I, therefore have no difficulty in agreeing with the majority opinion insofar as it holds that the State may adopt reasonable regulations which require a teaching institution, public or private, to submit its curriculum for examination and approval; or to disclose the attendance of its students; or even to subject its students to periodic testing. Such action would not, in my mind, constitute a violation of the religious clauses of either the United States Constitution or the Nebraska Constitution.

However, based upon the record in this case, I must respectfully dissent from that portion of the majority

opinion which in effect upholds the State's requirement that all elementary and secondary teachers, public or private, hold a baccalaureate degree before a student's attendance at such school may satisfy the State's compulsory attendance laws. I do not believe either logic or experience, or current law, justifies such a conclusion.

Just as no group may obtain a first amendment exemption from all State regulations by merely asserting that the regulated activity has some basis in a religious belief, neither can the State regulate or control all action of a group under the bald assertion that such regulation is necessary to preserve and maintain the health, safety, or welfare of such group. We have traditionally attempted to balance those concepts and have diligently sought to find a reasonable middle ground. As Chief Justice Burger wrote in *Yoder, supra* at 214-15: "Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, 'prepare [them] for additional obligations.'

. . .

(821) "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordina-

tion of all other interests. *E. g., Sherbert v. Verner,* 374 U. S. 398 [83 S. Ct. 1790, 10 L. Ed. 2d 965] (1963); *McGowan v. Maryland,* 366 U. S. 420, 459 [81 S. Ct. 1101, 6 L. Ed. 2d 393] (1961) (separate opinion of Frankfurter, J.); *Prince v. Massachusetts,* 321 U. S. 158, 165 [64 S. Ct. 438, 88 L. Ed. 645] (1944)."

In this case, I believe that we have failed to bring about the necessary balance and have unnecessarily opted in favor of the State when such result is neither required nor justified.

Time has adequately disclosed to us the hazards of attempting to determine in the abstract what is necessary and proper in providing children with an education. It would not require a great deal of research to establish that whatever steps we have taken heretofore in our effort to ensure a meaningful education for our children have not accomplished our objectives.

Likewise, we may find examples in our own State which prove the hazards of attempting to determine what is truly necessary to ensure education. In 1919 the Legislature, in what it then believed to be its infinite wisdom, enacted a law making it unlawful to teach a foreign language to a student before the student attained and successfully passed the eighth grade. This court, in affirming the constitutionality of that act, finding it a valid exercise of the State's police power, wrote, in part, as follows: "The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical

(822) to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interest of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into the language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state." See *Meyer v. State,* 107 Neb. 657, 661-62, 187 N. W. 100, 102 (1922).

In striking down the law and rejecting the logic of our opinion, the U. S. Supreme Court, in the case of *Meyer v. Nebraska,* 262 U. S. 390, 400, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) said: "The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. . . . Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws."

"It is well known that proficiency in a foreign language seldom comes to one not instructed at any early age, and experience shows that this is not injurious to the

health, morals or understanding of the ordinary child." *Id.* at 403.

That general notion was again approved in *Pierce v. Society of Sisters, supra,* wherein the U. S. Supreme Court was called upon to examine the Oregon compulsory education act. In striking down an Oregon law (823) requiring all children between the ages of 8 and 16 years to attend the public schools as an unlawful and unconstitutional interference with the liberty of parents and guardians to direct the upbringing and education of children under their control, the U. S. Supreme Court said at 534, in part: "Under the doctrine of *Meyer v. Nebraska,* 262 U. S. 390 [43 S. Ct. 625, 67 L. Ed. 1042], we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

While I recognize that we do not require attendance in a public school, but will certify a private school if its teachers all hold baccalaureate degrees, I find nothing either in our statutes or in logic which compels a conclu-

sion that one may not teach in a private school without a baccalaureate degree if the children are to be properly educated. Under our holding today, Eric Hoffer could not teach philosophy in a grade school, public or private; Julia Child could not teach cooking; and Thomas Edison could not teach the theories of electricity. While none of them could teach in the primary or secondary grades, all of them could could teach in college. I have some difficulty with a law which results in requiring that those who teach must have a baccalaureate degree, but those who teach those who teach need not. The logic of it escapes me. The experi (824) ence of time has failed to establish that requiring all teachers to earn a baccalaureate degree from anywhere results in providing children with a better education.

While it may be appropriate for a state to set such requirements in a public school where state funds are expended and, in effect, the state is the employer, I find no basis in law or fact for imposing a similar requirement in a private school. The failure of the private school to have as adequate and as trained teachers as the public school may be a factor which parents will take into account in deciding whether their children should be enrolled in that private school. I do not believe, however, that it should disqualify children from satisfying the compulsory attendance laws. I could accept a regulation which required instructors in such schools to satisfy the functions they were hired to perform. I believe, however, that such functions may be adequately performed absent a baccalaureate degree.

I am of the opinion that our Legislature also holds that view. There are at least two specific statutory provi-

sions concerning teachers which lead one to that conclusion. Neb. Rev. Stat. § 79-1247.05 (Reissue 1976) specifically provides that regulation with regard to the issuance of certificates shall be "based upon earned college credit, or *the equivalent thereto* . . ." (Emphasis supplied.) It is difficult to imagine how "the equivalent thereto" can be satisfied if the college degree is the minimum requirement. Obviously, the Legislature concluded that something other than classroom attendance in a college would be sufficient to satisfy certain educational requirements of a teacher.

And, likewise, as argued by appellants, Neb. Rev. Stat. § 79-1247.06 (Reissue 1976) provides, in part, that the *"maximum"* requirement which the State Board of Education may impose on one seeking certification is a baccalaureate degree. Yet, by mere rule, the state board has converted the maximum require (825) ment into a minimum requirement. This action taken by the state board in promulgating Rule 21 appears to me to constitute the exercise of undelegated legislative authority and may, therefore, be void. See *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N. W. 2d 227 (1960).

The record in this case clearly establishes that the failure of all instructors in appellants' school to hold a baccalaureate degree has not in any manner detracted from the quality of the education being given its students. No evidence was offered that, absent a baccalaureate degree, one is not qualified to teach. Likewise, the State conceded at oral argument before this court, that the program of instruction offered by appellant school was, indeed, satisfactory, and if submitted to the State for approval, would undoubtedly be approved. Yet

that approval would not result in the school's being certified or in the students' status being such as to satisfy the compulsory attendance law. That defect could not be cured unless and until all instructors held a baccalaureate degree, as if the earning of such a degree somehow magically bestowed upon the recipient that knowledge which one without such a degree could not otherwise obtain.

Even the State Board of Education has recognized that the obtaining of a degree may, under certain circumstances, be waived. Rule 21-(70) of the rules adopted by the State of Nebraska Department of Education under date of July 8, 1977, provides for the issuance of an emergency teaching certificate. The bases upon which such certificate may be issued are, in part: "[T]o legalize the payment of a salary from tax sources to a person not fully qualified for a regular teaching certificate required for the position to be filled; or to legalize the employment in a private, parochial or denominational school of a person not fully qualified for a regular teaching certificate required for the position to be filled."

While it is true that there are further requirements (826) of that rule which ultimately may compel the individual to obtain a baccalaureate degree, one must ask the question: If the holding of such a degree is so critical as to affect the education of a child, why does the State Board of Education waive it under any circumstance? Obviously, the requirement of holding such a degree is not so indispensable to the providing of a good and sufficient education that it must be required under all circumstances and at all times.

It may be argued, as the State does, that any other requirements would impose a severe burden upon the State, in that it would then be required to conduct various tests of students in these schools in order to determine whether, in fact, they are receiving an adequate education. No one, however, has ever suggested that the mere fact that action required to be performed by the government may be difficult justifies the government's refusal to perform the required act.

The majority points out that to wait until after a period of time has expired before we test the students may be too late. If the holding of a baccalaureate degree by a teacher in and of itself ensured that students would thereby be educated and able to pass the test, that argument might wash. Experience, however, discloses that students taught by teachers holding baccalaureate degrees do not necessarily receive an adequate education in each and every instance. The record in this case supports that view. Witnesses who qualified as experts in the field of education ventured the opinion that the mere fact that a person held a baccalaureate degree did not mean that he or she would be a good teacher.

In my view, attempting to strike a balance between the various interests of the parties herein does not justify requiring that all persons teaching in appellants' school can qualify as a teacher only by holding a baccalaureate degree. I believe there are other reasonable regulations which can be adopted for private (827) schools that would permit these schools to continue, thereby striking the necessary balance between the two competing interests. I would have so held.

IN THE
DISTRICT COURT OF CASS COUNTY, NEBRASKA

STATE OF NEBRASKA, ex rel. PAUL L. DOUGLAS, Nebraska Attorney General and RONALD D. MORAVEC, Cass County Attorney,

Plaintiffs,

vs.

FAITH BAPTIST CHURCH of Louisville, Nebraska a Corporation; FAITH CHRISTIAN SCHOOL, Louisville, Nebraska; EVERETT SILEVEN; EDGAR GILBERT; TRESSIE SILEVEN; MARTHA GILBERT; HELEN ALDRICH; RALPH LILES; KENNETH HEARD; DAVE CARLSON; and WALTER PETERSON,

Defendants.

Docket 24 Page 138

MEMORANDUM OPINION

The plaintiff in this action is the State of Nebraska, ex rel. Paul L. Douglas as the Attorney General of the State of Nebraska and Ronald D. Moravec as the County Attorney of Cass County, Nebraska. The defendants are the Faith Baptist Church of Louisville, Nebraska, Faith Christian School which is a part of the Faith Baptist Church, and other named individuals who are ministers in the church or who are teachers in the school or are members of the Board of Directors of said church. The action is one for injunctive relief on the premise that the school is violating nine different areas of the school laws of this state and that the individuals by their actions are either actively engaged in the administration or teaching in the school without complying with state regulatory statutes as to teachers and administrative personnel, and further violating the general school laws.

The petition prays that the corporate entity and the individuals be enjoined from further operation of Faith Christian School until such time as they shall have complied with the school laws of the State of Nebraska.

The defendants in turn allege that Faith Christian School is one of the ministries of Faith Baptist Church and as such is inseparable and that the regulations and the statutes cited by the plaintiff and promulgated by the Nebraska State Department of Education do not apply to Faith Baptist Church or its ministry, Faith Christian School, and that the school laws and rules are unconstitutional in that they are a violation of the First and Fourteenth Amendments to the United States Constitution.

On May 11, 1979, a hearing was had on the petitioner's application for a temporary injunction which was at that time denied by the Court. Further hearings were had on the 16, 17 and 18 of July with extensive testimony and documentary evidence presented. At the conclusion of the hearings, the matter was taken under advisement; the plaintiffs being given a period of three weeks in which to file briefs in support of their position and the defendants to be given a period of ten days thereafter in which to file an amended answer.

The Court has now received and read the briefs and is proceeding with a determination of the issues involved. At the outset it should be said there is no question of the defendants' right to conduct a private school, but rather whether the defendants in the conduct of such school can be compelled to comply with the minimum statutory requirements and regulations as to teacher qual-

ifications, as to administrative personnel qualifications and general compliance with the school laws of the state.

The defendants generally take the position that the bible requires Christian parents to educate their children in a manner consistent with the teachings of the bible and that the only way to fulfill that command would be to establish their own school; such school being an integral and inseparable part of the ministry of Faith Baptist Church.

The defendants further take the position that any statutory law or regulation promulgated under authority of a statute is an invasion of their First Amendment Rights to the free exercise of religion and they pray for judicial protection from the enforcement of the statutory law and the rules and regulations of the Department of Education.

The evidence would indicate that Faith Christian School has been in operation for two complete school years and in the 77-78 school year had 16 students. In the 78-79 school year it had a total of 28 students. The courses taught in the elementary groups include English, mathematics, science, social studies, spelling, reading, art, music, Christian Womanhood and health. In the high school the same subjects are taught plus home economics and typing.

The defendants throughout these proceedings have expressed a dislike for the words "school" and "teacher", preferring identification of "ministry" in lieu of school and "monitor" in lieu of teacher.

The evidence would indicate that secular subjects are taught with a biblical background in an attempt to convey a moral of right or wrong in accordance with the tenants of the Faith Baptist Church.

The defendants further maintain that these are self-taught courses. The evidence would indicate that each child has a cubicle assigned to him or her for study and a given subject for a portion of the school day. The defendants contend the placing of the child together with the book causes the knowledge in the volume to be transmitted to the child. There is no clear explanation of how this takes place. If the child needs help, he or she places a flag in an upright position and the monitor only then goes to the child's aid. The monitor or teacher then proceeds to aid the child in the interpretation in the extracting of language from the volume. This procedure would, in the eyes of the Court, come within the definition of teach as used in Rule 14-(1)(g), and especially that portion of prescribing and directing the learning experience of the pupil.

There seems to be no serious dispute as to the facts. Reverend Sileven is admittedly the president of Faith Baptist Church and the superintendent of Faith Christion School; Reverend Gilbert is the principal of Faith Christian School; and each of the foregoing defendants are performing administrative functions which control actions in the school and neither of them has a professional administrative and supervisory certificate. The evidence would further indicate that they are conducting a private school which has not been approved. Further, that they failed to make reports in accordance with Section 4 of Nebraska Revised Statutes 79-207 requiring a

report to the superintendent of the school district of a list of pupils enrolled with the age and address of each.

The evidence would indicate that the defendants Tressie Sileven, Martha Gilbert and Helen Aldrich are performing functions as teachers and that none of them has a teacher's certificate as required under the law of this state.

The evidence would further indicate that the defendants Kenneth Heard and Dave Carlson are members of the Board of Directors of the corporate entity Faith Baptist Church and as such, with guidance from the membership of the church, establish policy for the church and school.

Many of the witnesses testified as to being dissatisfied with public school instruction. The record gives no evidence that the public schools of the City of Louisville and surrounding areas are deficient in any of the areas complained of or that there is crime or immoral acts which are in any way condoned or even occurring within those communities. The instances of conduct complained of by witnesses are not specific either as to the school or the area, and even if true there is no showing of an attempt to correct the faults within the system itself.

The evidence establishes that the text books as used in Faith Christian School are being used in approved schools within this state and as such are acceptable to and approved for private schools by the State Board of Education. Over the United States these books were used in approximately twenty-five hundred schools in 78-79, and witnesses estimate that there will be three thousand such schools using the texts in 79-80.

The Court agrees that some changes of the regulations under Rule 14 would be desirable, especially one requiring new books periodically regardless of the content. Since the Accelerated Christian Education text books have been and are presently being used and approved within the system in this state, there would appear to be no constitutional question involved.

The defendant church and school have raised the issue in their pleadings of the seeming conflict in Rule 14 which was approved by the State Board of Education on August 1, 1975 and revised on May 7, 1976. The general grant of authority for authoring and promoting such rules is N. R. S. 79-328. It is in 14 numbered paragraphs and was amended by L. B. 205 of the 1977 Session Laws. The amendment appears in Paragraph 13 and refers to the irrigation of certain real estate under control of the Department of Education and the amendment has no bearing on any of the questions raised in this action. N. R. S. 84-904 provides that any agency rule or regulation promulgated under a statutory grant of authority shall become null and void upon the effective date of any statute which amends or modifies such statutory grant of authority.

This Court in its attempts to determine the intent of 84-904 has concluded that its purpose is to negate any rule or regulation where the grant of authority which the rule or regulation was promulgated is amended, modified and so forth. Here, under N. R. S. 79-328 there are 14 different paragraphs and in the eyes of the Court 14 different grants of authority. L. B. 205 related only to Paragraph 13 and any previous rule or regulation under the authority of Paragraph 13 became null and void upon

the amendment. The Court does not so interpret this to effect any rule or regulation promulgated under the other 13 grants of authority in that particular statute.

The principal Nebraska cases and their holdings are as follows: In *Meyer v. State of Nebraska,* 107 Neb. 657, the Court held: Every individual is at liberty to adopt and follow with entire freedom whatsoever religious beliefs appeal to him. That does not mean that he will be protected in every act he does which is consistent with those beliefs, for when his acts become inimical to the public welfare of the state, the law may prohibit them though they are acts done in pursuance of and in conformity with the religious scruples of the individual.

Zevin v. School District No. 11 of the Village of Cozad, 144 Neb. 100: A school district has no authority to enter into a contract of employment with a teacher who is to teach in its public school unless he has a Nebraska teacher's certificate registered in the office of the county superintendent of the county in which he is contracting to teach. The statute involved herein covers both private and public schools with regard to its basic requirements. And apparently the most recent and most general case is that of *Meyerkorth v. State of Nebraska,* 173 Neb. 889 which in substance held that the state as parens patriae and in the interest of the residents of the state may establish reasonable minimum requirements for compulsory school attendance, certification of teachers and for the operation and supervision of parochial schools.

The Court is of the opinion that secular subjects do not necessarily become sectarian because the subject matter is presented in a biblical context. Of the subjects related in the interrogatories, it is the interpretation of this Court that Christian Womanhood is the only exception and that the teacher or teachers of that subject matter should not be required to have a teacher's certificate. All other subjects appear to be secular in nature and those who are in the process of imparting information to the young must meet the minimum requirements as established by the state as to certification for teachers.

It is the conclusion of the Court that the standards for administrative personnel, for teachers and the rules and regulations as promulgated by the Board of Education are within the police powers of the state in the fixing of standards for those engaged in the teaching of secular subjects. The religious beliefs of the defendants in the case at bar do not exempt them from complying with the reasonable requirements of the laws of this state. The constitutional protection of religious freedom, while it ensures religious equality on one hand, does not provide for immunity from compliance with reasonable civil requirements imposed by the state.

With the exception of the defendants Liles and Peterson, the relief prayed for in the form of an injunction will issue under separate order of this Court.

BY THE COURT:

/s/ Raymond J. Case
District Judge

APPENDIX B

JUDGMENT OF DISTRICT COURT OF CASS COUNTY, NEBRASKA

IN THE
DISTRICT COURT OF CASS COUNTY, NEBRASKA

STATE OF NEBRASKA, ex rel. PAUL L. DOUGLAS, Nebraska Attorney General, and RONALD D. MORAVEC, Cass County Attorney,

Plaintiff,

vs.

FAITH BAPTIST CHURCH of Louisville, Nebraska, a Corporation; FAITH CHRISTIAN SCHOOL, Louisville, Nebraska; EVERETT SILEVEN; EDGAR GILBERT; TRESSIE SILEVEN; MARTHA GILBERT; HELEN ALDRICH; RALPH LILES; KENNETH HEARD; DAVE CARLSON; and WALTER PETERSON,

Defendants.

Docket 24 Page 138

JUDGMENT

Now on the 16th day of July, 1979, the above entitled came before the Court for hearing on the merits. For the purposes of the hearing the plaintiff State was present by James F. Begley, Deputy County Attorney and Ronald D. Moravec, County Attorney of Cass County, Nebraska. The defendants were present by their counsel, Charles Craze of Cleveland, Ohio, and Gary Dunlap of Milford, Nebraska.

Evidence was adduced over a period of three days, the parties resting on the 18th of July. Counsel agreed to submit arguments in the form of briefs, the same being

permitted by the Court with the plaintiff being limited to three weeks from the 18th and the defendants to have a period of ten days thereafter in which to file a reply brief.

The Court having received and read the briefs and being well and fully advised in the premises finds:

1. That the defendant Faith Baptist Church, through its officers and directors, is conducting a private school in Louisville, Cass County, Nebraska;

2. That said school is being operated in violation of the rules and regulations of the Department of Education and the statutes of the State of Nebraska in that neither the superintendent nor the principal thereof hold a Nebraska administrative and supervisory certificate;

3. That the defendants Tressie Sileven, Martha Gilbert and Helen Aldrich are performing the functions of teachers in said school without holding a Nebraska teaching certificate as required by law;

4. That none of the administrators or teachers have filed certificates with the county superintendent of Cass County, Nebraska, as required by law;

5. That the administrators of said school have failed to file a fall approval report in each of the years that the school has been operated in violation of the rules and regulations of the Department of Education;

6. That none of the individual defendants who are teaching in the school have filed a complete transcript of their college credits as required by the rules and regulations of the Department of Education;

7. That the defendant Faith Baptist Church and its officers, to-wit: Reverend Everett Sileven, Reverend Ed-

gar Gilbert, Kenneth Heard and Dave Carlson have failed to seek initial approval status as an approved school system as required by the rules and regulations of the Department of Education;

8. That each of the individual defendants in concert or individually have generally failed to comply with the school laws of the State of Nebraska in the operation of a private school and that an injunction should be granted in accordance with the prayer of the petition.

IT IS THEREFORE ORDERED, ADJUDGED AND CONSIDERED by the Court that the Faith Baptist Church together with the president thereof, Reverend Everett Sileven, and Reverend Edgar Gilbert, the defendants Tressie Sileven, Martha Gilbert, Helen Aldrich, Kenneth Heard and Dave Carlson be and each of them are hereby enjoined from further operation of a private school or the using of church property for the operation of a private school until such time as they have complied with the Nebraska statutes and the rules and regulations of the Department of Education governing approved schools.

BY THE COURT:

/s/ Raymond J. Case
District Judge

APPENDIX C

NOTICE OF APPEAL

43029

IN THE SUPREME COURT OF NEBRASKA
STATE OF NEBRASKA, EX REL. PAUL L. DOUGLAS, Nebraska Attorney General, and DONALD D. MORAVEC, Cass County Attorney,

Appellees,

vs.

FAITH BAPTIST CHURCH OF LOUISVILLE, NEBRASKA, a Corporation; FAITH CHRISTIAN SCHOOL, LOUISVILLE, NEBRASKA; EVERETT SILEVEN; EDGAR GILBERT; TRESSIE SILEVEN; MARTHA GILBERT; HELEN ALDRICH; RALPH LILES; KENNETH HEARD; DAVE CARLSON; and WALTER PETERSON,

Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Faith Baptist Church, et al., the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Nebraska affirming the judgment of the District Court of Cass County, Nebraska, entered in this action on January 30, 1981.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (2).

Dated: April 13, 1981.

/s/ Charles E. Craze
GIBBS & CRAZE
6929 West 130th Street
Suite 600
Parma Heights, Ohio 44130
(216) 845-6800

Received April 16, 1981
Supreme Court of Nebraska

CERTIFICATE OF SERVICE

I, Charles E. Craze, a member of the Bar of the Supreme Court of the United States and counsel of record for Faith Baptist Church of Louisville, Nebraska, et al., the Appellants herein, certify that on April 13, 1981, pursuant to Rule 28.3, Rules of the Supreme Court, I served copies of the foregoing Notice of Appeal on each of the parties herein, as follows:

On the State of Nebraska, ex rel. Paul L. Douglas and Ronald D. Moravec, Appellees herein, by depositing such copies in a United States mailbox, with first class postage prepaid, properly addressed to Ronald D. Moravec, Cass County Attorney and James F. Begley, Deputy Cass County Attorney, Cass County Courthouse, Plattsmouth, Nebraska 68048 and Paul L. Douglas, Attorney General of Nebraska and Harold Mosher, Assistant Attorney General of Nebraska, State Capitol Building, Lincoln, Nebraska 68509.

GIBBS & CRAZE

By: /s/ Charles E. Craze

6929 West 130th Street
Suite 600
Parma Heights, Ohio 44130
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APPENDIX D

NEBRASKA EDUCATIONAL STATUTES AND REGULATIONS

Sec. 79-201. COMPULSORY EDUCATION; IN ALL NEBRASKA SCHOOL DISTRICTS; MINIMUM ATTENDANCE REQUIRED.—Every person residing in a school district within the State of Nebraska who has legal or actual charge or control of any child not less than seven nor more than sixteen years of age, shall cause such child to attend regularly the public, private, denominational, or parochial day schools each day that such schools are open and in session except when excused by school authorities, unless such child has been graduated from high school. The term shall not be less than one hundred seventy-five days in any district. The term shall not be less than one hundred seventy-five days in any district, except that in the event of the failure of any district which receives twenty per cent or more of its total receipts for general fund purposes from federal sources, to actually receive receipts anticipated at the time of the adoption of the school budget from taxes, state funds, federal funds, tuition, or other sources, the board of education of such district may, at any time during the school year, elect to close all or part of its schools. (Laws 1949; 1953; 1959; 1971.)

Sec. 79-201.01. YEAR-ROUND OPERATION OF PUBLIC SCHOOLS; PURPOSE.—The purpose of sections 79-201.01 to 79-201.09 of this act is to promote increased efficiency in the utilization of public school houses and other school facilities by providing for a program

of year-round operation of the public schools of this state. The Legislature finds that the cost of education is substantially increased when schoolhouses sit idle for three months of the year and that the rural and pioneer conditions which dictated summer closing of public schools no longer prevail in many of the school districts of the state. (Laws 1973.)

Sec. 79-201.02. YEAR-ROUND OPERATION OF PUBLIC SCHOOLS; MAY CONVERT. Commencing July 1, 1974, any public school district in this state may convert to year-round operation under the provisions of sections 79-201.01 to 79-201.09 of this act. (Laws 1973.)

Sec. 79-201.03. YEAR-ROUND OPERATION OF PUBLIC SCHOOLS; STATE BOARD OF EDUCATION; APPROVE.—No public school district shall convert to a year-round operation without obtaining approval therefor by the State Board of Education based upon a determination that the plans therefor comply with the provisions of section 79-201.01 to 79-201.09 of this act and the rules and regulations adopted by the State Board of Education pursuant thereto. (Laws 1973.)

Sec. 79-201.04. YEAR-ROUND OPERATION OF PUBLIC SCHOOLS; FEASIBILITY; BOARD OF EDUCATION; STUDY.—The board of education of any school district proposing to convert to a year-round operation shall study the feasibility thereof and prepare a plan of operation and submit the results of such study and plan to the State Board of Education. (Laws 1973.)

Sec. 79-201.05. YEAR-ROUND OPERATION OF PUBLIC SCHOOLS; FEASIBILITY, STUDY; CONTENTS.—Such feasibility study shall be conducted pur-

suant to rules and regulations of the State Board of Education. Such study shall take into account (1) the present and projected enrollment of the district as a whole and for each grade actually taught, (2) the extent of utilization of existing schoolhouses and other school facilities, (3) the savings of future construction costs that would result from year-round operation. (4) the problems of school staffing that might result, (5) the probability of public acceptance, and (6) such other matters as the State Board of Education may require. (Laws 1973.)

Sec. 79-201.06. YEAR-ROUND OPERATION OF PUBLIC SCHOOLS; PROPOSED PLAN; CONTENTS. —Such proposed plan shall show all aspects of the proposed operation and provide for;

(1) A minimum of one hundred seventy-five days of required school attendance for each pupil in each school year;

(2) Any attendance center at which year-round operations shall be conducted, including the change of such center as the changing characteristics of the district may require;

(3) The basis of pupil assignments to the particular year for instruction and to attendance centers, including provisions for student transfers;

(4) Curriculum development and organization;

(5) Staffing, with adequate provisions for vacations and opportunities for professional growth of certified staff and faculty members;

(6) Student vacation time;

(7) Transportation and maintenance provisions; and

(8) Such other matters as the State Board of Education may require. (Laws 1973.)

Sec. 79-201.07. YEAR-ROUND OPERATION OF PUBLIC SCHOOLS; BOARD OF EDUCATION; APPROVE.—The State Board of Education may (1) approve the feasibility study and the proposed plan of operation, in which case it shall so notify the board of education and authorize it to proceed under section 79-201.08 of this act, (2) approve the study but disapprove the proposed plan in whole or in part, in which case it shall return the proposed plan with a statement of its objections thereto and advise the board of education that an amended plan may be submitted, or (3) disapprove both the study and the proposed plan, in which case it shall return them with its objections thereto and advise the board of education that a new or extended study may be conducted and submitted and that an amended plan may be submitted. No action shall be taken under section 79-201.08 of this act until both the study and the proposed plan have been approved by the State Board of Education. (Laws 1973.)

Sec. 79-201.08. YEAR-ROUND OPERATION OF PUBLIC SCHOOLS; SUBMIT TO VOTERS; APPROVAL; DISAPPROVAL; RESUBMITTED; WHEN. — When both such study and such proposed plan have been approved by the State Board of Education, the board of education shall submit the question of converting to year-round operation to the voters of the district at a general school election or at a special election called for that purpose. If a majority of the voters voting on the proposal are in favor thereof, the school district shall convert to

year-round operation commencing the first July 1 following the election. If the issue is defeated, it shall not again be submitted to the voters until a new study and plan have been submitted to and approved by the State Board of Education. (Laws 1973.)

Sec. 79-201.09. YEAR-ROUND OPERATION OF PUBLIC SCHOOLS; STATE BOARD OF EDUCATION; RULES AND REGULATIONS; ADOPT; COMPUTATION AND DISTRIBUTION OF FUNDS; PROVIDE.—The State Board of Education shall adopt rules and regulations necessary for the implementation of Sections 79-201.01 to 79-201.09 of this act. Such rules and regulations shall provide for the computation and distribution of funds under Chapter 79, article 13, so that a school district which has converted to year-round operation will receive the same amount from each of the various funds as it would have received if it had not so converted. (Laws 1973.)

Sec. 79-207. COMPULSORY ATTEDANCE; ANNUAL ATTENDANCE REPORTS; KEEP RECORD.—Each teacher in public, private, denominational, and parochial schools of this state shall keep a record showing (1) the name, age, and address, of each child enrolled, (2) the number and county of the school district in which said school is located, (3) the number of days each pupil was present and the number of days absent, and (4) the cause of absence. On the third day on which the public, private, denominational, and parochial schools are in session at the beginning of each school year, each teacher in a Class I district shall send to the county superintendent a list of the pupils enrolled in his school with the age, grade, and address of each, and in all other districts such

report shall be made to the superintendent of such district. (C. S. 1943, s. 79-1911; Laws 1949; 1971.)

Sec. 79-312. COUNTY SUPERINTENDENT; GENERAL DUTIES.—The county superintendent shall: (1) Visit each of the schools of his county at least once in each year to examine carefully into the discipline, modes of instruction, progress and proficiency of the pupils, and make a record of his findings; (2) counsel with teachers and district boards as to the course of study to be pursued, and methods for the improvement of the instruction and discipline of the school; (3) note the condition of the schoolhouse and appurtenances thereto, and may make suggestions as to location for new schoolhouses, for warming and ventilating the same, and for the general improvement of the schoolhouse and grounds; (4) promote by public lectures and teachers' institutes, and by such other means as he may devise, the improvement of the schools in his county, and the elevation of the character and qualifications of the teachers thereof; (5) enforce the compulsary attendance laws and consult with the teachers and school boards to secure general and regular attendance of the children of his county at the public schools; (6) furnish to each district in the county a copy of the course of study for public schools, as prescribed by the State Department of Education and forward to the teachers, from time to time, such written or printed questions for reviews based upon such course of study as in his judgment are necessary or expedient; (7) furnish the necessary blanks for the annual report of the secretary, the census report of the district, and such other blanks as he may deem helpful for the work of the schools, and the necessary record books for the schools and for the district

officers; (8) purchase all supplies required for the operation of his office, to be paid for from the funds allotted to him in the budget; (9) prepare and file the required annual inventory statement of county personal property in his custody or possession, as provided in sections 23-346 to 23-350; (10) attend all meetings required by the department; and (11) submit to the department, on or before August 15 of each year, a consolidated census report under oath showing the number of children belonging to each school district of the county through twenty years old based on the census report from the secretary of each district in the county. (C. S. 1943, s. 79-1502; Laws 1949; 1959; 1969.)

Sec. 79-1229. CERTIFICATE REQUIRED OF ADMINISTRATORS AND SUPERVISORS.—All persons holding the official title of (1) superintendent of schools, (2) principal or supervisor of an accredited school, or (3) supervisor of any special subjects or subject in which such persons actually supervise the work of other teachers in that subject or those subjects, shall hold either a Nebraska Administrative and Supervisory Certificate or a Nebraska Professional Administrative and Supervisory Certificate (C. S. 1943, s. 79-1329; Laws 1949; 1957.)

Sec. 79-1233. NEBRASKA CERTIFICATE; SPECIAL TEACHER'S PERMIT; PREREQUISITE TO TEACHING.—No person shall be employed to teach in any public, private, denominational, or parochial school in this state who does not hold a valid Nebraska certificate or permit issued by the Commissioner of Education legalizing him to teach the grade or subjects to which elected, except that no Nebraska certificate or permit shall be required of persons teaching exclusively in junior colleges

organized as part of the public school system. (2) Public, private, denominational, or parochial schools in the state may employ persons who do not hold a valid Nebraska teaching certificate or permit issued by the Commissioner of Education to serve as aides to a teacher or teachers. Such teacher aides may not assume any teaching responsibilities. A teacher aide may be assigned duties which are nonteaching in nature, if the employing school has assured itself that the aide has been specifically prepared for such duties, including the handling of emergency situations which might arise in the course of his work. (Laws 1949; 1957; 1965; 1969.)

Sec. 79-1239. TEACHER'S OR ADMINISTRATOR'S CERTIFICATE; REGISTRATION WITH COUNTY SUPERINTENDENT REQUIRED; FAILURE; EFFECT.—(1) Each teacher shall register his certificate in the office of the county superintendent of the county in which he is employed. The superintendent shall endorse upon the certificate that it has been registered and the date of registration. Such registration shall be without fee, and no certificate to contract for a school shall be valid until the certificate is so registered. The school board at the time of contracting with a teacher or administrator shall transmit to the county superintendent the name of the teacher or administrator to be employed, together with the position to which elected. Fifteen calendar days after the first day of teaching the county superintendent shall certify to the school board the name of any teacher or administrator who has not registered his certificate or given evidence of application to the Department of Education and a qualification for a teaching certificate or permit. Sixty calendar days after the first day

of school the county superintendent shall certify to the school board the name of any teacher or administrator who has not registered a certificate or permit valid for the position to which elected and that the contract of the teacher or administrator has been declared invalid. The teacher or administrator shall not be reimbursed for any services to the school district after the date of receipt of notification by the board of education that the contract of the teacher or administrator has been declared invalid.

(2) Sixty calendar days after the first day in each school year, the county superintendent shall notify the county treasurer to withhold all school money belonging to any district employing an uncertified teacher or administrator until the teacher or administrator has registered a certificate with the county superintendent or has been dismissed by the board of education employing such teacher or administrator, and it shall be the duty of the county treasurer to withhold such money. (C. S. 1943, s. 79-1338; Laws 1949; 1959; 1961; 1971.)

Sec. 79-1247.05. TEACHERS' CERTIFICATES; STATE BOARD OF EDUCATION; ADOPTION RULES, REGULATIONS, AND PROCEDURES; BASIS EARNED COLLEGE CREDITS.—The board, with the counsel of the commissioner and such advisory committee or committees as it deems necessary, shall establish and adopt appropriate rules, regulations, and procedures governing the issuance, renewal, conversion, revival, cancellation, suspension, and revocation of certificates and permits to teach, counsel, supervise, and administer in all elementary and secondary schools in this state based upon earned college credit, or the equivalent thereto, in human-

ities, in social and natural sciences, in mathematics, in practical arts, and in professional education, for particular teaching, counseling, supervisory, or administrative assignments, and on scholarship attained in earning such college credit, and on successful teaching, and on moral, mental and physical fitness for teaching, all in accordance with sound educational practices. (Laws 1963.)

Sec. 79-1247.06. TEACHERS' CERTIFICATES; FIRST ISSUANCE; QUALIFICATIONS REQUIRED.—The maximum which the board may require for the first issuance of any certificate or permit, valid for teaching only, in all schools, for a term of not less than three years, shall be that the applicant is of sound mental and physical health and of good moral character and a statement countersigned by an authorized official of a standard institution of higher education which certifies the grade levels and subject fields or areas of specialization for which the applicant was specifically prepared to teach and that the applicant has (1) a baccalaureate degree, (2) satisfactorily completed, within two years of the date of application, the institution's regular approved or accredited program of preparation for teaching, and (3) met all other appropriate requirements of the institution as a teacher. Any person who holds the Nebraska Provisional Rural Elementary Certificate on the effective date of this act may renew that certificate any number of times by earning not less than eight approved semester hours of course work acceptable toward a baccalaureate degree during each of the three-year terms for which the certificate is issued. (Laws 1963; 1976.)

SEC. 79-1701. PRIVATE OR PAROCHIAL SCHOOLS; LAWS APPLICABLE.—All private, denom-

inational, and parochial schools in the State of Nebraska, and all teachers employed or giving instruction therein, shall be subject to and governed by the provisions of general school laws of the state so far as the same apply to the grades, qualifications, and certification of teachers and promotion of pupils. All private, denominational, and parochial schools shall have adequate equipment and supplies, and shall be graded the same and shall have courses of study for each grade conducted therein, substantially the same as those given in the public schools where the children attending would attend in the absence of such private, denominational, or parochial schools. (C. S. 1943, s. 79-1913; Laws 1949.)

Sec. 79-1707. SAME; VIOLATIONS; PENALTY.—Any person violating any of the provisions of sections 79-1701 to 79-1706 shall be guilty of a Class III misdemeanor. (C. S. 1943, s. 79-1920; Laws 1949; 1971; 1977.)

RULE 14 Revised

Regulations and Procedures for Approving The Continued Legal Operation of all Schools And the Opening of New Schools

Approved by the State Board of Education
Effective August 1, 1975

Revised May 7, 1976

NEBRASKA STATE DEPARTMENT OF EDUCATION

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RULE 14

REGULATIONS FOR THE APPROVAL OF PUBLIC AND NONPUBLIC SCHOOLS

RULE 14-(0)

GENERAL PROVISIONS

As authorized by Nebraska Statute, section 79-328 R. S. Supp. 1974, school systems which operate in accord with this Rule are classified as Approved School Systems and are entitled to the rights and privileges afforded all legally operating school systems. Only school systems approved for continued legal operation by the State Board of Education are considered to be providing a program of instruction which is in compliance with the compulsory attendance laws. Public high schools approved by the State Board of Education are eligible to collect non-resident high school tuition and are exempt from the non-resident high school tuition tax levy.

This Rule shall be in force for the 1975-76 school year and shall continue in force until revised.

Each recognized school system which is operating on the effective date of this Rule shall be classified as an approved school system and shall be subject to the provisions of this Rule.

The introductions and explanations included with the approval regulations are intended to provide clarification and guidance to schools in their efforts to comply with this Rule. The introductions and explanations, however, are not requirements of this Rule.

STATUTORY AUTHORITY

This Rule is adopted pursuant to the power and duty vested in the State Board of Education, in Section 79-328 (5) (c) R. S. Supp. 1974, to:

> . . . establish rules and regulations based upon the program of studies, guidance services, the number and preparation of teachers in relation to the curriculum and enrollment, instructional materials and equipment, science facilities and equipment, library facilities and materials, health and safety factors in buildings and grounds, and procedures for classifying, approving, and accrediting schools, for approving the opening of new schools, for the continued legal operation of all schools, and for the approval of high schools for the collection of non-resident high school tuition money in accordance with the rules and regulations provided for in this subdivision: Provided that the State Board of Education shall approve a school for the collection of non-resident high school tuition money where a hardship would result to the students and a substantial effort is being made to comply with the rules and regulations established.

See also, sections 79-201, 79-1247.02, 79-1701, 79-1304 (4) and 79-1331 (2) R. R. S. 1943, and section 79-328 (5) (c) R. S. Supp. 1974.

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DEFINITIONS AND PROCEDURES

14-(1) Definitions - as used in interpretation and application of Rule 14, Regulations for the Approval of Public and Non-Public Schools.

(a) A School Year - The term means a minimum of thirty-six weeks of instruction. Section 79-101 (6) R. R. S. 1943.

(b) School Week - The terms means a period of five days of instruction. Section 79-101(8) R. R. S. 1943.

(Explanation for 14-(1) (a) and (b): The school year is a minimum of 180 school days (5 x 36 = 180 days). Teachers shall be under contract for at least 180 days. A school system must have school open and in session with pupils in attendance not less than 175 days (see Section 79-1304 (4) R. R. S. 1943). The remaining five days may be assigned for teacher in-service, parent conferences, regular school days or for other purposes determined by the local board of education or governing body.)

(c) School Day - The term means a minimum of five clock hours of instruction with both students and teachers in attendance. Two and one-half clock hours of instruction shall be the minimum for one-half day of school. (Kindergarten may observe a 2-hour minimum.) In emergency or special situations when school will be closed for a portion of the day, school must have been in session with students and teachers in attendance for at least four clock hours to be counted as a full school day, and for at least two clock hours to be counted as one-half day of school.

(d) School System - The term means a public school district under the jurisdiction of a single school board, or a private, denominational or parochial school under the direction or advisement of a governing body.

(e) School - The term means an individual attendance center within a school system.

(f) Teacher - The term means any certificated employee who is regularly employed for the instruction of pupils in the school system. (Section 79-101(10) and (11) R. R. S. 1943 and 79-1701 R. R. S. 1943).

(g) Teach - The term means and includes, but is not limited to, the following responsibilities:

(i) The organization and management of the classroom or the physical area in which the learning experiences of pupils take place.

(ii) The assessment and diagnosis of the individual educational needs of the pupils.

14-(1) (g)

(iii) The planning, selecting, organizing, prescribing, and directing of the learning experiences of pupils.

(iv) The planning of teaching strategies and the selection of available materials and equipment to be used.

(v) The evaluation and reporting of student progress. Section 79-101(13) R. R. S. 1943.

(h) Elementary Grades - The term means those grades designated by the school system as elementary, but not to include any above grade eight.

(i) Secondary Grades - The term means those grades designated by the school system as secondary, but not to include any below grade seven.

(j) High School Grades - The term means grades 9 through 12 in a school system organized with a four year high school and grades 10 through 12 in a school system organized with a three year high school. School systems organized with a three year high school may include the ninth grade in determining compliance with this Rule.

(k) Course - The term means a particular subject, subject area or defined sequence of learning experiences provided under the direction and supervision of the school system.

(l) Offered - The term means a course for which instruction is actually provided by and in the school system during the school day with a certified teacher in charge and with one or more pupils enrolled and in attendance.

(m) Instructional Unit - The term means 15 clock hours of classroom instruction in a course offered in the secondary school. Instructional Units should be computed to the nearest one-tenth.

(i) In the case of performance oriented curricula, each Instructional Unit claimed shall be based on an offering similar in extent to that provided in fifteen clock hours of classroom instruction. The school system shall have on file the course description, the acceptable performance requirements and the number of Instructional Units to be claimed for each performance oriented course.

(Explanation for 14-(1)(m): The definition of Instructional Unit provides flexibility in scheduling and establishes a uniform state base for determining total course offerings and percentage of courses taught by endorsed teachers.

14-(1) (m) (i)

The following explanation may help in computing Instructional Units for a course: $15 \times 60 = 900$ minutes per Instructional Unit. The total number of minutes of classroom instruction of-

fered in a course divided by 900 equals the Instructional Units. For example:

An English course which meets for 40 minutes a day, 5 days per week for 36 weeks would total $40 \times 5 \times 36 = 7200$ minutes; $7200 \div 900 = 8$ Instructional Units. The 8 Instructional Units would count toward compliance with the Language Arts requirement of 40 Instructional Units. (See 14-(32)(a))

A Biology course which meets 55 minutes per day, 5 days a week for 36 weeks totals 11 Instructional Units.

The credit given to students toward meeting graduation requirements is entirely a local determination. Ten credits could be given for both examples above.)

14-(2) *Application for Approval*

A school system seeking initial approval status or one wishing to be reinstated as an approved school system shall make this intention known to the State Department of Education in writing on or before April 15 prior to the opening of the school year. The State Department of Education will forward the necessary application forms to the Head Administrator of the school system. The completed application forms must be received by the Department no later than May 1.

(a) The school system applying for approval must affirm that the completed application form contains information that is accurate at the time of reporting. The form must be signed by the County Superintendent and/or by the Superintendent of the public school district in which the school is located.

(b) Prior to June 1, the applying school system must arrange for a meeting with representatives of the State Department of Education to determine if the provisions of the regulations for approved schools can be met. If it is determined that the applying school system can comply, a recommendation will be made to the State Board of Education for probationary approval.

(c) Upon affirmative action by the State Board of Education, the applying school system shall be granted probationary approval and shall be entitled to all of the privileges afforded an approved school system.

14-(2)

(d) By October 15 of the year of probationary approval, representatives of the Department of Education or a designated County Superintendent shall visit the new school system while it is in session to determine if the provisions of this Rule are being met.

If, as a result of the on-site visit, it is found that the provisions of this Rule are not being met, staff members of the State Department of Education shall recommend to the State Board of Education that the new school system be non-approved. Notice of non-approval shall be given by certified mail to the Head Administrator, all members of the governing body of the school system and the respective County, City or Area Superintendent.

Action taken by the State Board of Education for non-approval shall be effective 60 days from the date that the notice to the designated school officials is postmarked.

14-(3) *Violations, Probation and Non-Approval*

(a) In determining the approval status of a school system, each failure to meet a numbered or lettered regulation of this Rule shall constitute a separate violation unless otherwise stipulated in the wording of the regulation. The following shall be the maximum number of allowable violations of this Rule in one school year:

K-12 School System ..... 4 violations
7-12 or 9-12 School System ..... 2 violations
K-6 or K-8 School System ..... 2 violations

(b) When it is found that an approved school system exceeds the allowable number of violations (14-(3) (a)), members of the State Department of Education shall recommend to the State Board of Education that the school system be placed on probation for the ensuing school year.

(c) When it is found that an approved school system which is on probation continues to exceed the allowable number of violations (14-(3) (a)), members of the State Department of Education shall recommend to the State Board of Education that the school system be non-approved to operate as a legally constituted school system for the ensuing school year.

(d) An approved school system shall be subject to non-approval without probation when the number of violations of this Rule in one year reaches the following:

K-12 School System ..... 7 or more violations
7-12 or 9-12 School System ..... 4 or more violations
K-6 or K-8 School System ..... 4 or more violations

14(3) (d) Under the provisions of Regulations 14(3) (c) and (d), staff members of the State Department of Education will consult with the Head Administrator and/or representative of the Board of Education or governing body of the school system. If after such consultation, it is determined that the violations continue to exist, the Department of Education shall, on or before March 15 of said school year, recommend appropriate action to the State Board of Education.

Any approved Nebraska school system which corrects or removes existing violations of this Rule on or before February 1 with evidence verified by the State Department of Education, shall be credited with compliance with the regulation for the entire year.

(e) When a violation occurs or becomes evident after March 15 which results in an excess of the number of allowable violations provided in 14-(3) (a) and/or 14-(3) (d), it shall be cause for reconsideration of the school system's approval status.

(f) Members of the State Department of Education, in determining whether to recommend to the State Board of Education that a school system be placed on probation or be non-approved, shall take into consideration the purpose and philosophy of the school system and the quality and appropriateness of the total educational program and it may take into account other factors such as the sparsity of population, location, and transportation when they create an undue hardship on the student.

(g) The State Department of Education recognizes the need for "special Purpose Schools"

such as Schools for the Visually Impaired, Schools for the Acoustically Impaired, Job Corps Schools providing high school graduation, schools operating within the confines of a correctional institution, and Correspondence Schools, Procedures for application and additional information may be secured from the State Department of Education.

Any variance from this Rule which may be necessary to accommodate the needs of any Special Purpose School shall be approved by the State Board of Education.

14-(4) *Provisions for Notice and Hearing*

(a) When a school system is placed on probation by the State Board of Education, notice of such action shall be given on or before April 15 to the Head Administrator of the school system, the President of the School Board and the respective County or City Superintendent, and if a non-public school, the Area or Diocesan Superintendent. This notice shall specify the Regulations which the school system has violated during the school year.

-7-

14-(4)

(b) When a school system is non-approved by the State Board of Education, notice of such action shall be given by certified mail on or before April 15 of said year to the Head Administrator of the school system, all of the members of the School Board and the respective County or City Superintendents and, if a non-public school, the Area or Diocesan Superintendent. This notice shall specify the Regulations which the school system has violated during the school year and shall set a date on which the Head Administrator of the school system, the members of the School

Board or any patron in the school system may be heard if they wish to attest or protest the change in classification.

Such hearing shall be in accordance with the Rules of Practice and Procedure of the State Board of Education which may be obtained from the State Department of Education.

14-(5) *Reports*

(a) The Head Administrator of each school system in order for the school system to be approved by the State Board of Education shall annually submit the following Approved School Reports to the State Department of Education on forms prescribed by the Commissioner of Education. (Section 79-307 R. R. S. 1943.)

(i) A Fall Approval Report shall be submitted to the State Department of Education on or before October 1 of each school year.

(ii) An Annual Term Summary Report shall be submitted to the State Department of Education on or before July 20 following each school year.

(b) Each public school system not having a district superintendent or principal shall submit the Fall Approval Report to the County Superintendent by October 1 of each school year. The County Superintendent shall examine the reports, verify the accuracy of the information and submit the reports to the State Department of Education by November 1.

Each non-public school system not having a superintendent or principal shall submit the Fall Approval Report to the Diocesan or Area Superintendent by October 1. The Dio-

cesan or Area Superintendent shall examine the reports, verify the accuracy of the information and submit the reports to the State Department of Education by November 1.

(c) Any approved school system which fails to submit any one of the reports described in 14-(5) on or before the indicated due date shall cause the State Department of Education to issue official notice of such failure by certified mail to the president of the Board of Education of the school system, and the County Superintendent or, if a non-public school system, to the Diocesan

or Area Superintendent. If the delinquent report is not received by the State Department of Education within 30 days of the date on which the notice is postmarked, staff members of the State Department of Education shall recommend to the State Board of Education that the school system be non-approved.

(d) Approved school systems shall make such reports as are requested by the Commissioner of Education to the County Superintendent of the County in which the school system is located. Each failure to make such requested reports to the County Superintendent shall be considered a separate violation of this Rule.

14-(6) *Statutory Requirements*

(a) Each approved school system shall meet the statutory requirements for a school of its legal class. Each statutory violation shall be treated as a separate violation from this Rule.

THE ELEMENTARY SCHOOL

THE ELEMENTARY INSTRUCTIONAL PROGRAM

Introduction: The elementary instructional program should help each student acquire basic skills and understandings in all areas of the elementary curriculum. In addition, the elementary instructional program should be organized so that each student can maintain a positive attitude and a feeling of success. These general purposes and/or goals may vary somewhat from school to school and the unique needs of a particular school community should be reflected in a locally produced, written statement.

The instructional program should reflect the school's purpose and/or goals and it should be flexible enough to allow for differing student needs and for differing teaching styles. Schedules should be prepared on a weekly basis rather than a daily basis so that subjects can be taught in flexible time arrangements enhancing the possibility that students can be helped to understand the relationships between areas. Reading and mathematics should be emphasized in the primary grades and should receive continuing emphasis in the middle and upper grades for those children having a special need in those areas.

Schools which offer a kindergarten program should recognize that it should be largely devoted to building a background of experiences for children so they will be able to associate meanings with words as more formal reading activities begin. The attitudes toward school which are formed by kindergartners will remain with them. They should not be hurried or forced into a situ-

ation they are not ready for. Instead, kindergarten should form a foundation for a positive attitude which can be fostered by each successive teacher. See Section 79-549 R. R. S. 1943.

14-(7) The instructional program of the elementary school shall be based on a written statement of purposes and/or goals developed at the local level and approved by the local Board of Education or governing body. This document shall be on file in each elementary school building and each professional elementary staff member shall have a copy.

14-(8) The local Board of Education or governing body shall develop and annually up-date a written set of policies based upon the statement of purposes and/or goals. This document shall be on file in each elementary school building.

14-(9) The elementary school shall have on file a schedule that is representative of a week's activities and that includes each subject area designated in 14-(9) (a) through 14-(9) (h). It reflects the school's purposes and goals.

14-(9)

(a) The elementary school shall provide instruction in reading and language arts.

(Explanation for Regulation 14-9 (a): The reading and language arts program helps children to develop skills in reading, speaking, listening, handwriting, spelling, grammar, and composition, and provides opportunities for appreciation of literature, self-expression, and creativity.)

(b) The elementary school shall provide instruction in mathematics.

(Explanation for Regulation 14-(9) (b): The mathematics program helps children to develop skills in number usage, basic number operation, problem solving, geometry, and measurement.)

(c) The elementary school shall provide instruction in social studies.

(Explanation for Regulation 14-(9) (c): The social studies program emphasizes experiences that will help children to develop an understanding of the world and its people. Such experiences draw from history, geography, economics, government, citizenship, career awareness, human relations, current affairs, and cultural studies.)

(d) The elementary school shall provide instruction in science.

(Explanation for Regulation 14-(9) (d): The science program emphasizes experiences that will help children develop an understanding of basic scientific concepts and natural phenomena. Such experiences draw from the physical, life, earth, and space sciences.)

(e) The elementary school shall provide instruction in health.

(Explanation for Regulation 14-(9) (e): The health program promotes the development of healthy attitudes and living habits and includes mental, physical, and public health, nutrition, safety, and drug education.)

(f) The elementary school shall provide instruction in physical education.

(Explanation for Regulation 14-(9) (f): The physical education program promotes the development of physical coordination, large and small muscle control, and positive mental atti-

tudes. Children are helped to maintain physical fitness, to develop wholesome leisure activities, and to acquire habits of safety.)

(g) The elementary school shall provide instruction in art.

(Explanation for Regulation 14-(9) (g): The art program provides an opportunity for children to be creative and expressive through experiences with a variety of tools, media, and processes. The program enables children to gain an appreciation for many forms of art, both past and present.)

14-(9)

(h) The elementary school shall provide instruction in music.

(Explanation for Regulation 14-(9) (h): The music program provides an opportunity for children to be creative and expressive through experiences in singing, listening, making and playing instruments, and reading musical notation. The program enables children to gain an appreciation for many forms of music, both past and present.)

14-(10) Pupils in kindergarten through sixth grade shall not participate in any kinds of athletic contests between schools within a school system or between school districts. Annual field or play days shall be excluded from this regulation.

14-(11) The school system shall have developed and adopted policies and procedures for special education programs for all resident handicapped children which are in compliance with Rule 51.

See Sections 43-641 and 43-649 R. R. S. 1943 and Sections 43-643 and 43-652 R. S. Cum. Supp. 1976.

14-(12) The school system shall utilize a competency measure which assesses mastery of a minimum acceptable performance in reading, writing, and arithmetic skills.

(Explanation for 14-(12): Criterion-referenced competency measures such as the Nebraska Assessment Battery of Essential Learning Skills may be used in meeting this regulation. Normative or comparative standards do not describe mastery and therefore may not be substituted for this requirement. Assessment should begin for most students in grade 5.)

14-(13) The school system shall maintain a record of each student's attendance, academic progress, and dates of enrollment in and withdrawal from the school. The school system shall have a written policy statement describing its process for communicating such information to parents and/or guardians and to other schools upon the student's transfer.

NUMBER, PREPARATION, AND ASSIGNMENT OF ELEMENTARY STAFF

Introduction: All children should be guided in their learning experiences by a competent teacher. It is generally agreed that a minimum of four years of preparation at a standard institution of higher education is needed to attain basic competencies as an elementary teacher. Regular participation in professional growth experiences should enable the teacher to continuously upgrade and improve teaching skills.

The elementary principal should establish the learning climate and provide leadership for the elementary program and staff. In addition to undergraduate college preparation in elementary education, the elementary principal should have successful teaching experience in the elemen-

tary school plus a Standard Administrative and Supervisory Certificate endorsed for the position of elementary principal.

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14-(14) Each professional staff member employed by the elementary school shall hold a valid Nebraska certificate or permit issued by the State Board of Education legalizing him or her to teach the grades or subjects to which elected. Persons teaching Religion classes in non-public schools which are not counted as a part of the school offering will be exempt from this regulation.

14-(15) (a) Computed on a full-time equivalency basis, a minimum of ninety percent of the teachers in the elementary grades shall be assigned to areas for which they hold a certificate having an appropriate endorsement ("Areas Of Specialization And The Levels For Which The Person Is Specifically Prepared"). Each school system shall be assessed one violation for each five percent or fraction thereof below the ninety percent minimum or one violation shall be assessed per teacher whichever is less. No school system shall be assessed more than one violation for non-compliance with this regulation during the 1976-77 school year nor more than two violations for non-compliance with this regulation for the 1977-78 school year.

(b) The local Board of Education or governing body shall review and approve the assignments given to all teachers. The review shall include information on each teacher's preparation, experience, and other relevant data. The approval, once made, shall be considered continuous until the assignment is changed.

14-(16) (a) The elementary school having two or more teachers shall have a principal or shall desig-

nate one teacher as head teacher. The head teacher shall hold at least a Pre-Standard Teaching Certificate with endorsement(s) for teaching in the elementary grades.

(Explanation for Regulation 14-(16) (a): A head teacher cannot carry out evaluation or supervision of other personnel. That function can only be carried out by the local Board of Education or governing body or by its authorized representative who must have an Administrative and Supervisory Certificate. Many other professional duties can be delegated to a head teacher in order to promote more efficient operation. Such duties might include: being the contact person when parents, board members, or others come to the school; gathering relevant budgetary information and preparing materials and equipment orders upon direction; carrying out policies established for emergency actions, such as injury or storm conditions; completing forms requested by the County Superintendent or Commissioner of Education; and coordinating parent-teacher conferences.)

(b) Each elementary school having ten or more teachers shall have a principal and shall provide at least 50 percent of the principal's time for administration and supervision.

14-(16)

(c) The principal shall hold an Administrative and Supervisory Certificate.

(d) The professional staff member in charge of the school system, whether superintendent, principal, head teacher, or teacher shall meet with the Board of Education or governing body at least quarterly to plan for the imple-

mentation of the educational program of the school.

14-(17) The overall ratio of pupils to total professional staff members with responsibilities in the elementary school shall not exceed 30 to 1. Each school building within the district shall be counted separately in determining the ratio. Only that portion of the professional staff member's time devoted to the elementary school will be counted in determining these ratios.

14-(18) Each elementary teacher shall participate in at least two days of in-service activities each year.

(Explanation for Regulation 14-(18): In-service activities can be sponsored by the local district, by the County Superintendent, by the Educational Service Unit, by colleges or universities, by the State Department of Education, or by other professional educational organizations. Examples of in-service activities are: participation in conferences or workshops, developing a local curriculum project, pre-opening orientation and visitation to other schools.)

ELEMENTARY INSTRUCTIONAL MATERIALS AND EQUIPMENT

Introduction: The instructional materials used in the elementary school should help children achieve the purposes and/or goals established for the elementary program. The teacher can better provide learning experiences at the level of each student if there is a variety of good instructional materials available. Children should become actively involved in learning through the use of learning games, manipulative materials, audio-visual materials, textbooks, reference books, instructional television, and other kinds of instructional materials.

A comprehensive elementary library-media program is vital to good elementary instruction and should be integrated into the total school environment. It is important that the elementary school provide students with learning resources which will enable them to explore areas of greatest interest to them. Minimum numbers of books and other materials are not established in relation to numbers of children because each child should have the same opportunity to work with a wide selection of resources. Supplementary sources such as the County Superintendent's office, the Educational Service Unit, the Mobile Library or a central lending library should be freely used to supplement the school's own collection of library resources.

14-(19) Each elementary school shall maintain specialized materials and supplies to support instruction in each area designated in Regulation 14-(9).

14-(20) At least fifty percent of the textbooks used by the elementary school for regular classroom instruction shall have a purchase date within five years previous to the school year in which the books are being used and shall have a copyright date no more than five years old at the time of purchase.

14-(21) Schools utilizing instructional television shall have current broadcast schedules and related program manuals.

14-(22) Each elementary school shall maintain and shall keep up-to-date an accurate card catalog on new acquisitions of library resource titles such as books, filmstrips, films, tapes and records owned by the school and a current inventory of other media and materials. All new library resources shall be properly marked and shelved according to a standard classification system.

(a) Provision shall be made to assure that all elementary children will receive instruction in use of the card catalog before entering the 6th grade.

(b) Each elementary school shall maintain a record of the number of books in the various subject areas in its library.

(Explanation for Regulation 14-(22) (b): The following Dewey Decimal distribution may help provide a balanced collection of books:

Dewey Numbers	Subject	Percentage
000-099	General Works	2 %
100-199	Philosophy	.5%
200-299	Religion	1 %
300-399	Social Science	5 %
400-499	Languages	.5%
500-599	Sciences	8 %
600-699	Useful Arts	5 %
700-799	Fine Arts	3 %
800-899	Literature	5 %
900-999	Geography, Travel, History, Biography	25 %
F & 398	Fiction and Fairy Tales	20 %
E	Easy Books for Grades 1-3	25 %)

(c) Each elementary school shall have at least one set of encyclopedia which shall have a copyright date within six years of the school year in which the encyclopedia are being used.

(d) Each elementary school shall acquire a minimum of 25 new library resources, exclusive of textbooks and encyclopedia, of different titles, per teacher per year up to 150 titles during one year.

(e) Each elementary school shall have and shall make use of at least one filmstrip projector and one tape player/recorder.

14-(22)

(f) Each elementary school shall subscribe to at least two children's magazines. One of these magazines shall be for primary grade children and one shall be for intermediate grade children.

(g) Each elementary school or each elementary teacher shall subscribe to at least one professional magazine.

14-(23) The school library resources shall be accessible to students during the entire school day.

(Explanation for Regulation 14-(22) and 14-(23): Children are able to use the library media center resources on both a scheduled and unscheduled basis. They can find print and non-print materials relating to all subject areas of the curriculum.)

ELEMENTARY SCHOOL FACILITIES AND EQUIPMENT

Introduction: The elementary school building should be constructed, maintained, and equipped to assure each pupil's health and safety. The rooms should be of a size that will permit various groupings of students when desired.

14-(24) Each elementary school shall maintain safe, healthful, and sanitary conditions within the building and on the school grounds.

14-(25) Each elementary school shall have the necessary medical supplies for the treatment of minor injuries.

14-(26) Each elementary school shall have immediate access to a telephone or other means of electronic communication.

14-(27) Each elementary classroom shall have an electrical wall outlet.

14-(28) Each elementary school shall have a lavatory, drinking fountain, rest room and toilet inside the school building.

(Explanation for Regulation 14-(28): The water supply system and toilet required in this regulation may be of the type used in travel trailers or motor homes.)

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THE SECONDARY SCHOOL

SECONDARY INSTRUCTIONAL PROGRAM

14-(29) The instructional program of the secondary school shall be based on a written statement of purposes and/or goals developed at the local level and approved by the local Board of Education or governing body. This document shall be on file in the administrative offices and each professional secondary staff member shall have a copy.

14-(30) The local Board of Education or governing body shall develop and annually up-date a written set of policies based upon the statement of purposes and/or goals. This document shall be on file in each secondary school building.

14-(31) The total instructional program offered in the high school (Refer to 14-(1) (j)) each year shall consist of courses offered to accumulate at least 200 Instructional Units.

14-(32) The instructional program in the high school shall include as a minimum the following subject fields for the number of Instructional Units shown in each.

(a) Language Arts - 40 Instructional Units. May include courses in English, Speech, Journalism and Foreign Language.

(b) Social Science - 30 Instructional Units. This must include instruction in citizenship annually as provided in section 79-213 R. R. S. 1943.

(c) Mathematics - 20 Instructional Units. 10 Instructional Units of advanced high school mathematics such as Algebra II, Geometry or Trigonometry shall be offered at least every other year.

(d) - 20 Instructional Units. 10 Instructional Units shall be offered each year in Biology and 10 Instructional Units each year in Chemistry or Physics. Chemistry and Physics shall be offered at least every other year.

(e) Vocational Education and/or Practical arts - 60 Instructional Units distributed in the areas listed in 14-(32) (e) (i) through 14-(32) (e) (viii). A minimum of 20 Instructional Units shall be offered in at least one area and a minimum of 10 Instructional Units shall be offered in at least two other areas listed in 14-(32) (e) (i) through 14-(32) (e) (vii). One of these required area offerings may be met through arrangement with another approved or accredited Nebraska school. A copy of the written arrangement or contract must be submitted with the Fall Approval Report. No more than 10 Instructional Units of contracted offerings may be counted in complying with 14-(31). One violation will be assessed for each infraction of the requirements in this regulation.

14-(32) (e)

(i) Vocational Agriculture/Agribusiness - includes courses such as Agribusiness Science, Agribusiness Occupations Education, Mechanized Agriculture, and Special Vocational Needs in Agribusiness Education.

(ii) Business and Office Education - includes courses such as Business Law, Economics, Typing, Bookkeeping, Shorthand, Office Machines, and Clerical Office Practice.

(iii) Distributive Education - includes courses such as Distributive Education, Marketing and Merchandising, Distributive Education Lab, and Distributive Education On-The-Job Training.

(iv) Health Occupations Education - includes courses such as Allied Health and Health-On-The-Job Training.

(v) Home Economics Education - includes courses such as Comprehensive Homemaking, Clothing and Textiles, Consumer Education, Foods and Nutrition and Adult Living.

(vi) Trade and Industrial Education - includes courses such as Electricity, Mechanical Drawing, Graphic Arts, Auto Mechanics, Construction Trades, and Machine Shop.

(vii) Industrial Arts - includes courses such as Industrial Arts, Woods, Building Construction, Architectural Drafting, Electricity, Power Mechanics, Welding, and General Metals.

(viii) Other Occupationally Oriented Courses - Such courses should emphasize exploration and/or preparation for occupations and general employment characteristics of the area. Such courses may be offered in the areas listed in 14-(32) (e) (viii) (A) through 14-(32) (e) (viii) (G).

(A) Communications and Media - includes occupationally oriented courses concerned with journalism, broadcasting, motion pictures, and other forms of communication.

(B) Fine Arts - includes occupationally oriented courses concerned with the visual and performing arts. Instructional Units given for performing groups such as band or choir may be counted in meeting 14-(32) (e) (viii) (B). Regular classes in fine arts such as art, music, and music appreciation shall not be counted in meeting 14-(32) (e) (viii) (B).

(C) Humanities - includes occupationally oriented courses concerned with theology, languages, history, writing, teaching, and other humanities.

(D) Marine Science - includes occupationally oriented courses concerned with aqua-culture and marine technology.

(E) Recreation and/or Hospitality - includes occupationally oriented courses concerned with travel,

sports, entertainment, recreation and leisure time activities.

(F) Public Services - includes occupationally oriented courses concerned with education, protection, public facilities and other governmental services.

(G) Personal Services - includes occupationally oriented courses concerned with food service, cosmetology, and other personal services.

(f) Physical Education - 10 Instructional Units. (Inter-scholastic activities are not accepted as a substitute for the physical education requirement.)

(g) Health - Provision shall be made for instructing pupils in a comprehensive health education program. (See Sections 79-1270.01 and 79-1270.02 R. R. S. 1943.) Health courses taught in the high school may be used in meeting up to four Instructional Units of the physical education offering requirement.

(h) Music - 4 Instructional Units. Instruction shall be in instrumental and/or vocal music.

(i) Art - 4 Instructional Units.

14-(33) Secondary schools including grades other than high school grades (Refer to 14-(1) (j)) shall provide instruction in the following subject fields in each grade during each school year:

Language Arts - must include identifiable instruction in speech and reading.
Social Science
Mathematics
Science
Health

Physical Education
Music
Art

The following instruction is required if the ninth grade is included:

Practical Arts - instruction shall be provided in at least two of the following:

Homemaking
Industrial Arts and/or General Shop
Crafts
Typing

14-(34) Each high school shall have a list which shows the courses and the number of credits required for graduation in its administrative office and included as a part of its School Board Policies. The Policies shall include a definition of the credit unit used by the school.

NUMBER, PREPARATION, AND ASSIGNMENT OF SECONDARY STAFF

14-(35) Each school system which includes a high school shall have a Head Administrator who shall hold a Nebraska Administrative and Supervisory Certificate with a superintendent's endorsement.

(a) A staff member assigned administrative responsibilities in the secondary school must hold at least a Provisional Administrative and Supervisory Certificate.

14-(36) The Administrator in charge of the secondary school shall devote a minimum of one-half of the school day to the responsibilities of administration and supervision and shall have no other assigned responsibilities during this time.

14-(37) Each professional staff member employed by the secondary school shall hold a valid Nebraska certificate or permit issued by the State Board of Education legalizing him or her to teach the grades or subjects to which elected. Persons teaching Religion classes in non-public schools which are not counted as part of the school offering will be exempt from this regulation.

14-(38) (a) A minimum of 70 percent of the Instructional Units offered in the secondary grades (all sections of all courses) during the regular school term shall be assigned to teachers who hold a certificate having an appropriate endorsement ("Areas Of Specialization And The Levels For Which The Person Is Specifically Prepared"), provided such endorsements are being offered by a Nebraska Standard Institution of Higher Education. Each school system shall be assessed one violation for each five percent or fraction thereof below the seventy percent minimum or one violation shall be assessed per teacher whichever is less. No school system shall be assessed more than one violation for non-compliance with this Regulation during the 1976-77 school year nor more than two violations for non-compliance with this Regulation for the 1977-78 school year.

(b) The local Board of Education or governing body shall review and approve the assignments given to all teachers. The review shall include information on each teacher's preparation, experience, and other relevant data. The approval, once made, shall be considered continuous until the assignment is changed.

14-(39) Each secondary school shall have a certificated person assigned for at least two clock hours per day to provide library-media services and shall have the responsibility for the secondary instructional materials and equipment.

14-(39)

(a) The person assigned to library-media services shall have at least 12 semester hours of college credit in the field of library-media.

14-(40) Each high school shall have a certificated person for at least two clock hours per day to provide individual or group counseling and guidance services to pupils.

(a) The person assigned to guidance services shall have completed at least 12 semester hours of graduate college credit in basic guidance and counseling. The guidance preparation shall include guidance techniques, educational measurement, and occupational and educational information.

14-(41) Complete transcripts of all college credits earned by each teacher shall be on file in the school's administrative office and in the State Department of Education.

14-(42) The overall ratio of pupils to total professional staff members with responsibilities in the secondary school shall not exceed 27 to 1. Each school building within the district shall be counted separately in determining the ratio. Only that portion of the professional staff member's time devoted to the secondary school will be counted in determining these ratios.

14-(43) Each secondary teacher shall participate in at least two days of in-service activities each year.

(Explanation for Regulation 14-(43): In-service activities can be sponsored by the local district, by the County Superintendent, by the Educational Service Unit, by colleges or universities, by the State Department of Education, or by other professional educational organizations. Examples of

in-service activities are: participation in conferences or workshops, developing a local curriculum project, pre-opening orientation and visitation to other schools.)

SECONDARY INSTRUCTIONAL MATERIALS AND EQUIPMENT

14-(44) Each secondary school shall have a central library media facility which shall be available to students during the entire school day.

(a) The library media center shall contain at least two sets of encyclopedia of different reading levels with copyrights within the past five years.

(b) The minimum total number of books, filmstrips, films, and tapes of different titles shall be 1,200 exclusive of textbooks, but including at least 600 titles of non-fiction books which can be found by title in the current edition of the *Standard Catalog for High School Libraries* published by the H. W. Wilson Company, or in the *Basic Book Collection for High Schools* published by the American Library Association, or in such other standard bibliography lists approved by the State Department of Education.

(c) The total required collection of titles of general reference materials in the secondary school library media center as specified in Rule 14-(44) (b) shall approximate, by subject area, the following recommended guide:

Dewey Numbers	Subject	Percentage
000-099	General Works	5%
100-299	Philosophy-Religion	2%
300-399	Social Science	10%
400-499	Languages	1%
500-599	Science and Mathematics	10%
600-699	Useful Arts	10%
700-799	Fine Arts	5%
800-899	Literature	10%
900-999	Geography, History, Travel, Biography	27%
F	Fiction	20%

(d) The library media center shall have file cabinet(s) for the vertical files. The vertical files shall contain a section of at least 100 main headings of general information such as described in the *Sears List of Subject Headings*, H. W. Wilson Company. The media center (or guidance office) shall maintain vertical files which have information concerning careers including college and vocational technical school catalogs.

(e) Each secondary school shall subscribe to the *Readers' Guide* or to the *Abridged Readers' Guide* as published by H. W. Wilson Company, or any other standard guide approved by the State Department of Education.

(f) At least ten periodicals listed in the *Abridged Readers' Guide* shall be subscribed to and shall be organized systematically for reference work.

(g) An accurate card catalog and a shelf list of all library resources shall be maintained and kept current.

(h) Each secondary school shall acquire a minimum of 150 new library resources, exclusive of textbooks and encyclopedia, of different

titles each school year. At least 50 percent of these titles shall be found in the standard references described in 14-(44) (b).

14-(45) Each secondary school shall have and make use of at least one sound motion picture projector, one overhead projector, one filmstrip projector, one slide projector, one record player, one tape player/recorder, and one projection screen.

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14-(46) (a) A copy of the basic textbook shall be provided for each secondary school pupil enrolled in courses in which a basic textbook is used.

(b) At least 50 percent of the textbooks used by the secondary school for regular classroom instruction shall have a purchase date within five years previous to the school year in which the textbooks are used and shall have a copyright date no more than five years old at the time of purchase.

SECONDARY GUIDANCE SERVICES

14-(47) The school system shall have developed and adopted policies and procedures for special education programs for all resident handicapped children which are in compliance with Rule 51.

See Sections 43-641 and 43-649 R. R. S. 1943 and Sections 43-643 and 43-652 R. S. Cumm. Supp. 1976.

14-(48) The school system shall provide a comprehensive cumulative record of attendance, academic progress, and dates of enrollment in and withdrawal from the school for each student enrolled. The semester records shall be up-to-date within one month after the semester ends.

14-(49) Provision shall be made, through written policy of the local Board of Education or governing

body, for evaluation of student academic progress.

14-(50) Each school system shall utilize a competency measure which assesses mastery of a minimum acceptable performance in reading, writing, and arithmetic skills.

(Explanation for 14-(50): Criterion referenced competency measures such as the Nebraska Assessment Battery of Essential Learning Skills may be used in meeting this Regulation. Required performance in activities of daily living which utilize essential skills in reading, writing, and arithmetic may also be used in meeting this requirement. Normative or comparative standards do not describe mastery and therefore may not be substituted for this requirement.)

14-(51) The school system shall have a written policy statement describing its process for communicating pertinent information concerning students to their parents and/or guardians and to other school systems upon the student's transfer. Section 79-4,158 R. S. Supp. 1974.

SECONDARY SCHOOL FACILITIES AND EQUIPMENT

14-(52) Each secondary school shall maintain safe, healthful, and sanitary conditions within the school building and on the school grounds.

14-(53) Storage space shall be provided so that materials and equipment may be securely stored in a space other than in student work areas.

14-(54) Each classroom or laboratory shall be designed and equipped to serve the specific purpose for which it is intended. Classroom-laboratory combinations shall have sufficient work areas to accommodate each student.

Office-Supreme Court, U.S.
FILED
JUL 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1837

In The

Supreme Court of the United States

October Term, 1981

FAITH BAPTIST CHURCH OF LOUISVILLE, NEBRASKA, a Corporation; FAITH CHRISTIAN SCHOOL, LOUISVILLE, NEBRASKA; EVERETT SILEVEN; EDGAR GILBERT; TRESSIE SILEVEN; MARTHA GILBERT; HELEN ALDRICH; RALPH LILES; KENNETH HEARD; DAVE CARLSON; and WALTER PETERSON,

Appellants,

vs.

STATE OF NEBRASKA, EX REL. PAUL L. DOUGLAS, Nebraska Attorney General and RONALD D. MORAVEC, Cass County Attorney,

Appellees.

APPEAL FROM THE SUPREME COURT OF NEBRASKA

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the Nebraska Supreme Court err in upholding the injunction against operation of the Faith Christian School until such time as that school was willing to come into compliance with the Nebraska statutes governing education?

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No. 80-1837

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October Term, 1981

FAITH BAPTIST CHURCH OF LOUISVILLE, NEBRASKA, a Corporation; FAITH CHRISTIAN SCHOOL, LOUISVILLE, NEBRASKA; EVERETT SILEVEN; EDGAR GILBERT; TRESSIE SILEVEN; MARTHA GILBERT; HELEN ALDRICH; RALPH LILES; KENNETH HEARD; DAVE CARLSON; and WALTER PETERSON,

Appellants,

vs.

STATE OF NEBRASKA, EX REL. PAUL L. DOUGLAS, Nebraska Attorney General and RONALD D. MORAVEC, Cass County Attorney,

Appellees.

APPEAL FROM THE SUPREME COURT OF NEBRASKA

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

MOTION TO DISMISS OR AFFIRM

Pursuant to Supreme Court Rule 16(1)(b), the appellees move to have this Court dismiss the appeal herein. It is clear that the appellants have failed to raise a substantial federal question. The issues which have been raised are all of insufficient magnitude, and all have been foreclosed by prior decisions of this Court.

STATEMENT OF THE CASE

On July 16, 1979, a hearing began in the District Court of Cass County, Nebraska (hereinafter, "District Court"), in which the appellees sought to permanently enjoin the operation of the Faith Christian School until such time as that school came into compliance with the laws of the State of Nebraska. As a result of that hearing, the District Court found, inter alia, that:

> 1. That the defendant Faith Baptist Church, through its officers and directors, is conducting a private school in Louisville, Cass County, Nebraska;
>
> . . .
>
> 3. That the defendants Tressie Sileven, Martha Gilbert and Helen Aldrich are performing the functions of teachers in said school without holding a Nebraska teaching certificate as required by law;
>
> 4. That none of the administrators or teachers have filed certificates with the county superintendent of Cass County, Nebraska, as required by law;
>
> 5. That the administrators of said school have failed to file a fall approval report in each of the years that the school has been operated in violation of the rules and regulations of the Department of Education;
>
> . . .
>
> 7. That the defendant Faith Baptist Church and its officers, to-wit: Reverend Everett Sileven, Reverend Edgar Gilbert, Kenneth Heard and Dave Carlson have failed to seek initial approval status as an approved school system as required by the rules and regulations of the Department of Education;
>
> 8. That each of the individual defendants in concert or individually have generally failed to comply with the school laws of the State of Nebraska in

the operation of a private school and that an injunction should be granted in accordance with the prayer of the petition.

The appellants appealed the issuance of the above stated injunction to the Nebraska Supreme Court. They contended, inter alia, that the injunction violated their rights under the First, Ninth and Fourteenth Amendments to the United States Constitution. It should be noted that the appellants in no way denied their continuing violation of the statutes in question.

The opinion of the Nebraska Supreme Court, which is published at 207 Neb. 802, 301 N. W. 2d 571 (1981), begins with a review of the relevant state statutes and regulations. The Court summarized these by saying:

> Neb. Rev. Stat. § 79-201 (Reissue 1976) requires that every person having charge or control of any child between the ages of 7 and 16 "shall cause such child to attend regularly the public, private, denominational, or parochial day schools each day that such schools are open and in session. . . ." Among other things, Neb. Rev. Stat. § 79-328 (Reissue 1976) requires that the State Board of Education shall have the power and duty to provide "supervision of the state school system"; to "establish . . . procedures for classifying, approving, and accrediting schools . . . for the continued legal operation of all schools"; and to "cause to be published laws and regulations governing the schools." In addition, the State Board of Education has caused to be promulgated and published Rule 14, which contains regulations and procedures for approving the continued legal operation of all schools. That rule provides: "Only school systems approved for continued legal operation by the State Board of Education are considered to be providing a program of instruction which is in compliance with the compulsory attendance laws." It

goes on to set forth what the curriculum shall consist of, and prescribes for the use of necessary materials and equipment, the length of the school day and year, and requirements relating to health and safety. Additionally, it requires the filing of a "Fall Approval Report" and an "Annual Term Summary Report," and, in order for a school to become approved and remain so, it mandates that each professional staff member employed by the school must "hold a valid Nebraska certificate or permit issued by the State Board of Education legalizing him or her to teach the grades or subjects to which elected." Rule 21, also adopted by the State Board of Education, provides rules for the issuance of certificates and permits to teach in Nebraska schools. Generally speaking, in order to qualify for a regular certificate, it is necessary that the applicant have obtained a baccalaureate degree.

The Nebraska Supreme Court (whose reasoning will be presented within the "argument" section of this brief) specifically held that application of these statutes to the appellants did not constitute an infringement of their constitutional rights, as those rights have been defined by the United States Supreme Court. Accordingly, the decision of the District Court was affirmed.

REASONS TO DISMISS THE APPEAL

I.

The appellants have failed to raise a substantial federal question.

A.

An appeal from a state court decision should be dismissed if it does not present a substantial federal question. This is mandated by Supreme Court Rule 16(1)(b). Where, as here, one seeking appeal claims that there has been an infringement of his right to free exercise of religion, and/or privacy, it is *his affirmative burden* to demonstrate the "coercive effect of the enactment as it operates against him in the practice of his religion." *Abington School Dist. v. Schempp,* 374 U.S. 203, 223 (1963); *see also, Board of Education v. Allen,* 392 U.S. 236, 248 (1968).

In the petition at bar, the appellants do not at any time, in any way, show how the statutes in question inhibit their rights either to the free exercise of their religious beliefs, or to parental privacy. They do not, because they cannot.

The affirmative burden on the appellants is the same regardless of whether they ground their argument on the free exercise clause of the First Amendment or on their parental privacy rights they see in the Ninth and Fourteenth Amendments. In either case the parties seeking an appeal must demonstrate that, in fact, the right in question has been infringed on. Should this burden not be met, it is clear that the moving party has failed to present a substantial federal question, and the appeal should therefore be dismissed.

In *State v. Shaver,* 294 N.W. 2d 883 (N.D. 1981) the North Dakota Supreme Court was faced with essentially the exact same set of facts and issues which are involved here. In analyzing the First Amendment claim made by

the Bible Baptist Church, the North Dakota Supreme Court said:

> At the outset, it is important to recognize that when a statute imposes a burden on religion, the statute is not automatically unconstitutional. . . as the United States Supreme Court said in *Braunfeld v. Brown*, . . . "[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."

Id. at 888.

The same analysis can and has been applied with regard to the Ninth and Fourteenth Amendments. In *Runyon v. McCrary*, 427 U.S. 160 (1976), the Supreme Court upheld a decision of the Fourth Circuit Court of Appeals which had enjoined certain private schools from denying entry to students based solely on their race. In considering the school's claim of a constitutional defense the Supreme Court said:

> It is clear that the present application of § 1981 infringes no parental right recognized in *Meyer, Pierce, Yoder,* or *Norwood.* No challenge is made to the petitioner schools' right to operate or the right of parents to send their children to a particular private school rather than a public school. Nor do these cases involve a challenge to the subject matter which is taught at any private school. . . . Meyer and its progeny entitle them to no more.

(Emphasis added.) *Id.* at 177. The *Runyon* Court then went on to specifically conclude that the parental privacy rights of parents are in no way compromised by reasonable state regulations in the area of education. *Id.* at 178.

The statutes of the State of Nebraska do not deny the appellants the right to operate a private school. The statutes do not deny them the right to use the A.C.E.

curriculum, nor to teach the religious beliefs which they feel bound to impart to their children. Given the fact that the appellants here are totally free to believe and teach what they will, it is obvious they have not, and cannot, demonstrate an infringement of their constitutional rights. All that the State of Nebraska requires is that the appellants comply with certain minimal requirements. Requirements which in no way inhibit the belief or teaching of religion.

B.

The appellants try to create the illusion of an infringement of their rights by claiming that the school is an arm of the church and is therefore exempt from compliance with *all state statutes.* (Brief of the appellants page 4.) Far from establishing this questionable proposition of law however, the appellants fail even to support it with reason and/or authority.

There is no explanation of how a church operated private school can be an arm of the church any more than any other church-owned property or business. However, even assuming arguendo that the school enjoys all the same protections as the church itself, that in no way can provide a blanket exception from "all state regulation."

The appellants' claim of total exemption from state control due to rights granted under the First, Ninth, and Fourteenth Amendments has in fact been foreclosed against them by prior decisions of the Supreme Court. Once an issue has been foreclosed by prior Supreme Court decisions, there is of course, no longer any possibility of a substantial federal question. *Leonard v. Viksburg,* 198 U. S. 416, 422 (1904).

From 1878, in the case of *Reynolds v. United States,* 98 U. S. 145 (1878), to the present, the Supreme Court has consistently held that while freedom to "believe" is absolute, the freedom to "act" is not. *See also, Cantwell v. Connecticut,* 310 U. S. 296 at 303-304 (1940); *Braunfeld v. Brown,* 366 U. S. 599 (1971); *Gillette v. United States,* 401 U. S. 437 (1971). Mr. Chief Justice Krivosha in the Nebraska Supreme Court decision below, quoted Chief Justice Burger in the case of *Wisconsin v. Yoder,* 406 U. S. 205 (1972) to the same effect where he said:

> Chief Justice Burger noted: "It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. . ."

207 Neb. at 818-819.

Thus, the belief action distinction has been established beyond question. Even the application of this belief-action dichotomy to the area of education has been foreclosed by prior decisions of the Supreme Court. These decisions are uniformly opposed to the appellants' position. In *Meyer v. Nebraska,* 262 U. S. 390 (1923), the Supreme Court said: "The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instruction in English, is not questioned." *Id.* at 402. Two years later, in *Pierce v. Society of Sisters,* 268 U. S. 510 (1925), the Supreme Court expanded on this by saying: "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children

attend some school." *Id.* at 534. Later, in *Prince v. Massachusetts,* 321 U. S. 158 (1944), the Supreme Court held: "And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance." *Id.* at 166.

The position taken in *Meyer, Pierce,* and *Prince,* was recently resubstantiated in the case of *Lemon v. Kurtzman,* 403 U. S. 602 (1971). In that case the Supreme Court held: "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate." *Id.* at 613. "Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts." *Id.* at 614. In *Runyon, supra,* the Supreme Court summed up by saying:

> The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation. . . . Indeed, the Court in Pierce expressly acknowledged "the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils."

427 U. S. at 178-179.

C.

The appellants have failed to raise a substantial federal question. Indeed, the appellants have totally failed to demonstrate any coercive effect of the Nebraska regulations as the same allegedly operate against them in the

practice of their religion Like Don Quixote, the appellants are simply fighting windmills. Under the Nebraska regulations the appellants may believe anything they wish. Also, the appellants may operate a private school provided they come into compliance with certain Nebraska regulations. These regulations in no way affect (let alone infringe on) any rights the appellants may have under the First, Ninth, or Fourteenth Amendments. Consequently, this appeal should be dismissed.

II.

Even if the statutes in question have some small effect on a right of the appellants, the minimal intrusion is fully justified by the compelling state interest in education.

A.

It has previously been established that the statutes attacked in this appeal do not affect any constitutional rights that the appellants may have. This, it was suggested, was in itself dispositive of their appeal. However, even if a minimal intrusion could in some way be shown, this would clearly be justified due to the compelling state interest in having adequate education for th young, and the need for the statutes in question to reach that goal.

That the state does indeed have a compelling interest in the area of education, has been firmly established. This interest was most succinctly set out in the case of *Brown v. Board of Education*, 347 U. S. 483 (1954). In that case the Supreme Court declared:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures

> for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Id. at 493.

The compelling interest in education was also recognized in *Wisconsin v. Yoder, supra,* where it was said: "There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." *Id.* at 213. Most recently the Supreme Court in *Wolman v. Walter,* 433 U. S. 229 (1977) stated: "There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education. . . . The State may require that schools are utilized to fulfill the State's compulsory-education requirement meet certain standards of instruction." *Id.* at 240.

Thus the state has a compelling interest in the education of the young. This was the clear and well-reasoned holding of the North Dakota Supreme Court in the highly analogous case of *State v. Shaver, supra.* In that case the Court expressly held:

> The burden on the parents' free exercise of religion in the present case is minimal, and is far outweighed by the state's interest in providing an education for its people. The rights guaranteed by the Free Exercise Clause of the First Amendment are not absolute and totally free from all legislative re-

> strictions. The Constitution does not withdraw from states the power to safeguard their vital interests. The incidental burden on the free exercise of the parents' religion as a result of the state approval requirement is justified under the circumstances *by the state's compelling interest in the regulation.* The record clearly shows that compulsory school attendance *at an approved school* would *not* pose a very real threat of undermining the Bible Baptist Church members' community and religious practices as they exist today.

(Emphasis added.) 294 N. W. 2d at 897.

Courts have in numerous cases upheld against free exercise claims certain government interests which were not nearly as compelling as the state's interest in education. In *Church of Scientology of California v. Richardson,* 437 F. 2d 214 (9th Cir. 1971), the court upheld the right of the government to refuse admission of E-meters into the country on grounds that they were misbranded, despite claims by the church that E-meters were used in the religious practice of scientology. "The . . . court held that the exercise of religious freedom does *not* include the freedom to violate the Federal Food, Drug, and Cosmetic Act." *Id.* at 217. Another court upheld the discharge of a Seventh Day Adventist who refused, on First Amendment free exercise grounds, to pay union initiation fees or dues pursuant to a union shop contract negotiated under the National Labor Relations Act by the union representing the unit in which she worked. *Linscott v. Miller Falls Company,* 440 F. 2d 14 (1st Cir. 1971), *cert. den.,* 404 U. S. 872 (1971). In that case the court found that the governmental interests in the union shop, in promoting industrial peace, and in requiring a fair sharing of the costs of collective bargaining outweighed the

plaintiff's First Amendment claims. The court related this to the case of *Sherbert v. Verner*, 374 U. S. 479 (1960) by using this comparison: "In the present case the interests are not merely that of the plaintiff versus the cost to the fisc [as in Sherbert]; opposed to plaintiff's interest are both the public and the private interests in collective bargaining and industrial peace." *Id.* at 18.

In short, South Carolina lost in *Sherbert* because its interest in protecting its treasury from comparatively few claims was not sufficient to outweigh the loss of basic livelihood and necessities which Mrs. Sherbert would have undergone by maintaining her refusal to accept Saturday work. Nebraska's interest in the present case is far greater than a few mere claims upon the public treasury; its interest in education ranks at least as great as, and undoubtedly greater than, keeping misbranded E-meters out of the country, or maintaining industrial peace through enforcing a union shop clause.

The three standards which the appellants are being required to meet are all *necessary* to assure quality education in the state. The state in effect mandates: (1) attendance reports, indicating which children are enrolled in the school; (2) state approval of the school's secular curriculum; and, (3) that the school employ only certified teachers in teaching capacities.

The need for attendance reports to assure that the state interest in education is being met is obvious. It is universally recognized that the state has the power to compel all children to attend some school and receive an adequate secular education. *Wolman v. Walter, supra.* As a corollary to this, it is fundamental that the state must have a means of knowing where each child is en-

rolled. Without attendance reports it would be fundamentally impossible for the state to know what child was where; it would thus also be impossible for the state to know if mandatory attendance laws were being complied with. It defies logic to see how the requirement of third day attendance reports could adversely affect the appellants' rights, however, any minimal intrusion (were it to exist) is fully justified here.

The requirement of state approval of the school's secular curriculum is equally necessary. *Palmer v. Board of Ed. of City of Chicago*, 603 F. 2d 1271, 1274 (7th Cir. 1979), *cert. den.*, 444 U. S. 1026 (1980). If the state were to be limited to compelling the child's attendance at some school, while at the same time having no further control over the learning experience once the child is in attendance, the state's interest would be rendered meaningless. The state would be forced, in effect, to give up all supervision of education. It has been admitted in this case, that the Faith Christian School uses the A. C. E. curriculum, which is acceptable to the State. However, that may not always be the case. It is highly possible that if an exemption such as the Faith Baptist Church wants here is granted, other groups claiming to have a "religious school exemption" could develop a curriculum which teaches concepts diametrically opposed to the state's interest. Anything could be taught, because there would be absolutely no supervision in that instance. The point is, that if the state is not allowed this minimal oversight power, its entire interest in education (which is a compelling interest) can be, and probably would be, effectively, lost. Again it seems more than clear, that any possible intrusion on the appellants' rights from this regulation

would be very slight, and that the regulation is itself absolutely necessary.

The third requirement in question, teacher certification, is also an absolutely necessary one for the state's regulatory function in the area of education. The state has not only the right, but also a duty, to see to it that those who teach its youth meet certain minimal standards of qualification.

A certified teacher in conformance with Rule 14 (this rule is fully set out in the appellants' brief at page App. 55) *could* teach the A.C.E. curriculum. Therefore, any incidental burden that this requirement may place on the Faith Christian Church is essentially negligible. The curriculum will be taught one way or the other.

Although certification is possibly not a 100 percent effective mechanism for keeping unqualified individuals out of teaching, it is highly effective. The federal courts have uniformly accepted the concept that a state, in its watchdog capacity over the public welfare, does have a right to license members of the various professions. *See, e.g., Turner v. The American Bar Association,* 407 F. Supp. 451 (N.D. Tex. 1975), *aff'd sub nom., Taylor v. Montgomery,* 539 F. 2d 715 (7th Cir. 1976), *aff'd sub nom., Pilla v. Am. Bar Ass'n,* 542 F. 2d 56 (8th Cir. 1976).

The Nebraska Supreme Court in the case at bar, accepted teacher certification on essentially the same rational. The Court upheld the certification requirement by saying:

> We are not suggesting as an absolute that every person who has earned a baccalaureate degree in teaching is going to become a good teacher, any more

> than one who has obtained the appropriate training and education will become a good engineer, lawyer, beauty operator, welder, or pipefitter. However, we think it cannot fairly be disputed that such a requirement is neither arbitrary nor unreasonable; additionally, we believe it is also a reliable indicator of the probability of success in that particular field. We believe that it goes without saying that the State has a compelling interest in the quality and ability of those who are to teach its young people.
>
> The cases we have cited from the Supreme Court of the United States should leave no doubt as to the critical interest which the State has in the quality of the education provided its youth. Although parents have a right to send their children to schools other than public institutions, they do not have the right to be completely unfettered by reasonable government requlations *as to the quality of the education furnished.*

(Emphasis added.) *Id.* at 816-817.

The state has a compelling interest in the area of education. Each of the requirements which the Faith Christian School is being asked to meet are reasonable, minimal, and necessary. They are fully justified.

B.

The appellants in the appeal at bar fail to press any alternative means of educational quality control, although they did so below. This is as it should be, because once the need for some type of control is established, the choice as to which reasonable means the state will use becomes totally one of a political question. Beyond this, it should be recognized that, at this time there is *no less restrictive means* of assuring quality teachers in education than the requirement of certification. *See, e.g.*, the concurring

opinion of Justice Vande Walle, in *State v. Shaver, supra*, at page 901.

C.

In the state courts below, the appellants recognized that the issues which they had raised had already been decided against them in Nebraska, in the case of *Meyerkorth v. State*, 173 Neb. 889, 115 N.W. 2d 585 (1962). The sole argument which they raised in this regard was that *Meyerkorth* was no longer the law after the United States Supreme Court decision in *Yoder, supra*. This claim however was thoroughly analyzed, and eventually rejected by the Nebraska Supreme Court.

Dismissal of the appeal now before the Court is totally consistent with the principles set out in *Yoder*. *Yoder* stands for the broad principle that any state regulation of education which affects a segment of society's religious beliefs, must meet the compelling state interest test. As the state has already shown (see our argument 2A above) this test is, in fact, met by the Nebraska regulations.

In spite of the appellants' contentions, *Yoder* cannot legitimately be expanded to the proposition that religious schools are exempt from all state regulation. In *Yoder* the Supreme Court declared: "There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." 406 U.S. at 213. The Supreme Court went on to conclude: "Nothing we hold is intended to undermine the general

applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards." *Id.* at 236. Thus, *Yoder* in no way limits the powers of the state in the area of education. It requires only a balancing of the state's interest against the effect on the right asserted. That balancing in this case, as has been demonstrated, comes out totally in favor of upholding the state regulations in this case.

The concurrence to the decision in *Yoder,* written by Mr. Justice White and joined by Mr. Justice Brennan and Mr. Justice Stewart made the point even more clearly by saying: "This would be a very different case for me if respondents' claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State." 406 U.S. at 238. This appeal is that different case referred to by Justice White. The appellants seek to escape all state regulation in the area of education. Nowhere, has the Supreme Court ever hinted that such a thing would be permissible. Opinions to the contrary however abound. Indeed, the *Yoder* decision is fully consistent with the dismissal of this present appeal.

CONCLUSION

For the foregoing reasons the appellees request that this Court, pursuant to Supreme Court Rule 16(1)(b), dismiss the appeal in this case.

Respectfully submitted,

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